IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78 ... 79-101

BARBARA BLUM, Individually and as Commissioner of the New York State Department of Social Services, and PHILIP L. TOIA,

Petitioners,

against

JOANNE SWIFT, Individually and on behalf of her minor daughter, MICHELLE SWIFT, and on behalf of all other persons similarly situated,

Respondents,

LYLIA ROE, Individually and on behalf of her minor children, CAROL ROE and CHERYL ROE,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Table of Authorities

Cases:

Statutes

Federal Statutes:

State Statutes:

REGULATIONS

OTHER AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit rendered on April 25, 1979.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is not yet reported. It is reproduced beginning at page 1a of the appendix to this petition. The opinion of the District Court for the Southern District of New York

granting respondents' motion for partial summary judgment is reported at 461 F. Supp. 578, and is reproduced beginning at page 4a of the appendix. The memorandum decision of the District Court denying petitioners' motion for judgment on the pleadings is reported at 450 F. Supp. 983, and is reproduced beginning at page 16a of the appendix.

Jurisdiction

The judgment of the Court of Appeals was rendered and entered on April 25, 1979. The jurisdiction of this Court to review that judgment rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Whether this Court's decision in *Van Lare* v. *Hurley*, 421 U.S. 338 (1975), prohibits the State from pro-rating AFDC grants to reflect the fact that the per capita needs of a minor child of the AFDC mother are fully met by the child's absent father?

2. Whether the federal regulations implementing the AFDC program require the state to assume that the per capita needs of AFDC recipients have increased when the per capita needs of a minor child of the AFDC parent are removed from the family's grant because those needs are fully met by the child's absent parent?

Statement Of The Case

Facts

Respondent Swift resides in Westchester County, New York, with her two minor children, Michelle Swift and William Rooney. Intervenor-respondent Roe resides in Monroe County, New York, with her three minor children,

Carol and Cheryl Roe, and Ann Marie Gauck. Prior to the events which led to the commencement of this action, Swift received a grant under the Aid to Families with Dependent Children (AFDC) program sufficient to meet the State-determined needs of a three person household in Westchester County. Roe received an AFDC grant sufficient to meet the State-determined needs of a four person household in Monroe County.*

After respondent Swift advised the Westchester County Department of Social Services that she was receiving $150 per month in court-ordered support payments for her son William, approximately three dollars more than William's per capita share of the household's needs, that agency determined that William's per capita needs should no longer be included in the family's AFDC grant. Accordingly, respondent Swift was advised that her full grant for a three person household would be reduced to two/thirds of the State-determined needs of a three person household: $289.34 per month.** A full grant for her three person household would have been $434, consisting of a $234 rent allowance and $200 basic needs allowance.

In May, 1977 intervenor-respondent Roe advised the Monroe County Department of Social Services that the father of Ann Marie Gauck had agreed to support his child, and she requested that Ann Marie be removed from

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* Respondent Swift received a $200 basic needs grant for three (18 NYCRR § 352.1), plus $198 for rent, which was her actual rent at that time. The maximum shelter allowance for a three person household in Westchester County is $259 (18 NYCRR § 352.3) or the actual rent, whichever is lower. Intervenor-respondent Roe received a $258 basic needs grant for four (18 NYCRR § 352.1) plus $192 for rent, which is the maximum shelter allowance for a four person household in Monroe County (18 NYCRR § 352.3).

** Swift's rent had increased to $234, still within the maximum rent allowance for a three person household in Westchester County. See 18 NYCRR § 352.3.

the family's AFDC grant. The county agency then advised respondent Roe that her family's full AFDC grant for a four person household would be reduced to three/fourths of the State-determined needs of a four person household: $337.50 per month.

Both Swift and Roe requested State fair hearings to contest the amount of the reduction of their AFDC grants. At their hearings, neither Swift nor Roe indicated in any way that the resources provided for the support of their non-recipient children were not meeting those children's per capita share of the household costs. In fact respondent Swift did not testify at all.

After the fair hearings, the State Commissioner of Social Services affirmed the determinations of the County agencies.*

Proceedings in the District Court

Swift commenced this action in May, 1977, contending that her AFDC grant should be equal to the State-determined standard of need for a two person household in Westchester County, which is $362 per month.** The two person grant is approximately $72 a month greater than two/thirds of a three person grant. The difference in grants results from a State determination that the per capita needs of a two person household are greater than the per capita needs of a three person household. See

* At the time of Swift's fair hearing, Philip L. Toia was the State Commissioner of Social Services. He was succeeded on November 7, 1977 by Barbara Blum, the current Commissioner. Respondents substituted Blum for Toia in her official capacity. Both Blum and Toia are sued individually. At the time of Roe's fair hearing Carmen Shang was the Acting Commissioner, but he has not been a party to this action at any time.

** The basic needs grant for a two person household is $150 (18 NYCRR § 325.1), and the maximum rent allowance for a two person household in Westchester County is $212. This is less than Swift's actual rent.

New York Social Services Law § 131-a(3); 18 NYCRR § 352.1.

Swift alleged that her AFDC grant had been "reduced" by this $72 difference, and that the "reduction" was due to petitioner's alleged policy of prorating AFDC grants when a non-legally responsible individual with sufficient non-welfare income to meet his own needs resides with an AFDC parent or caretaker relative and at least one needy child (17a*). Swift claimed that this policy was in violation of 45 C.F.R. §§ 233.20(a)(2)(viii) and 233.90(a), as well as the constitutional guarantees of due process, equal protection, and privacy. Federal jurisdiction was alleged under 28 U.S.C. §§ 1343(3) and 1331.

Petitioner Toia moved for judgment on the pleadings on the ground that Swift's claims were too insubstantial to support federal jurisdiction under 28 U.S.C. §§ 1343(3) and 1331, and that the $10,000 requirement of 28 U.S.C. § 1331 was not satisfied.** He also claimed that the original and amended complaints failed to state a claim on which relief could be granted.

While petitioner's motion was pending, Roe moved to intervene, claiming that her grant had been wrongfully computed under the policy alleged by Swift (28a). She contended that her AFDC household should receive a grant equal to the State-determined needs of a three person household, namely $381 per month, rather than three/fourths of the needs of a four person household, namely $337.50 per month.

In its decision of May 1, 1978, the District Court (H. F. WERKER, D.J.) granted Roe's motion to intervene and de-

* References followed by the letter "a" refer to the Appendix to this petition.

** Swift purported to satisfy the $10,000 requirement of § 1331 by her allegations of bad faith damages recoverable under her constitutional claims.

nied petitioner Toia's motion for judgment on the pleadings, holding that petitioner's good faith defense against the money damages alleged was premature (pp. 20a-21a), and that Swift's claims were neither so frivolous nor so insubstantial as to be beyond federal jurisdiction (p. 22a). The Court at that time declined to certify a class consisting of:

> "Persons who are residents of the State of New York, who are, were, or will be recipients of AFDC and whose grants have been, are being, or are threatened to be reduced, modified or suspended pursuant to defendants' policy of prorating the public assistance grant when an individual who has no legal obligation to support the AFDC family and who receives non-welfare income sufficient to meet his or her needs resides with an AFDC family consisting of a parent or caretaker relative and at least one needy child." (p. 29a).

However, the class described above was later certified on June 20, 1978.

Respondents subsequently moved for partial summary judgment on their statutory claim on September 14, 1978. The Court granted their motion, noting that although the pro-ration of respondents' grants based on economies of scale would be justified if the support payments of the non-recipient children were actually pooled to absorb those children's share of the household expenses, petitioners had not demonstrated that the support payments were so pooled (p. 12a). The Court held that petitioners had pro-rated the AFDC grants on the assumption that a non-recipient was contributing to the AFDC family without inquiry into whether in fact he did so, and that this practice conflicted with this Court's decision in *Van Lare* v. *Hurley,* 421 U.S. 338 (1975). Because 45 C.F.R. §§ 233.20 (a)(2)(viii) and 233.90 codify the *Van Lare* decision, the Court held that petitioners had violated those regulations. See pp. 11a-12a.

The Circuit Court

The Circuit Court affirmed on the opinions of the District Court. It also noted its agreement with the holding of those opinions that petitioners failed to make an individual determination as to whether either respondent had applied her child's income to shared household expenses, and that as a result petitioners had presumed contribution to the household in contravention of *Van Lare* v. *Hurley* and its implementing regulations. (p. 3a).

REASONS FOR GRANTING THE WRIT

POINT I

Van Lare v. _Hurley,_ 421 U.S. 338 (1975), does not prohibit the State from pro-rating AFDC grants on an economies of scale basis when the AFDC parent is provided with sufficient unearned income for the specific purpose of meeting the needs of the non-recipient minor child residing in the household.

The courts below have missed the gross distinction between the facts in *Van Lare* v. *Hurley,* 421 U.S. 338 (1975), and the facts in this case, resulting in a decision that defies common sense—as well as being legally unsound, administratively impractical and very costly to the State.

They blindly equated the presence of a nonpaying lodger, an adult who is not legally responsible for the support of the family on public assistance (the *Van Lare* case) with the presence of a minor child of the AFDC parent who cares for such child (along with caring for her other, needy, children in the household) and controls the money provided by his father for his support. Two such disparate factual situations cannot be imagined.

The decision of the courts below is at odds with AFDC's basic policy. Congress intended to "help maintain and

strengthen family life" and to assist the parents or relatives who live with needy children "to attain or retain capability for the maximum self-support and personal independence". 42 U.S.C. § 601. The legislation makes clear that this purpose is achieved by providing financial assistance for dependent children who have been deprived of the support normally provided by a parent, and that *AFDC is interchangeable with parental support.* See 42 U.S.C. §§ 602(a)(26), 656(a), 654(5), and 657.

This court's decisions in *King* v. *Smith,* 392 U.S. 309 (1968); *Lewis* v. *Martin,* 397 U.S. 552 (1969), and *Van Lare* v. *Hurley, supra,* implement the described legislative purpose by confining the obligation to support to the natural parent and those who have a state imposed duty to support. In its determination of a child's AFDC needs, the state is required to disregard the presence of other individuals in the household, absent proof that such individuals in fact provide support. *Van Lare* v. *Hurley, supra,* the decision relied on by the courts below, invalidated a state regulatory assumption that a "lodger" was self-supporting to the extent of his share of the rent and that the economies of scale therefore operated to reduce the child's per capita share. AFDC's purpose to support the child was frustrated, it was held, because the "lodger" who resided with the child was not in fact contributing the funds necessary to trigger the operation of the economies of scale, and the regulatory assumption was nonetheless applied to reduce the child's shelter allowance.

The decision below wrongly extends this principle to the circumstances presented by the instant case. Respondents' non-recipient minor children, William and Ann Marie, actually receive support sufficient to meet their per capita needs. Thus, unlike the pro-ration in *Van Lare* v. *Hurley, supra,* the pro-ration in the instant case does not rely on a presumption that the household's AFDC needs have been

reduced due to contribution from a person with no legal obligation to support the AFDC recipients. It does not rely on any presumption at all. It merely reflects the legislative precept that AFDC and parental support are to be used interchangeably for the same purpose: to meet the per capita share of the household costs attributable to the intended beneficiary of such payments. Therefore, respondents' per capita needs were not affected when the source of the support provided to William and Ann Marie changed from AFDC to the fathers of those children.

An administrative nightmare is caused by the failure of the courts below to comprehend the legislatively stated and judicially recognized intent of AFDC. Moreover, the Court of Appeals for the Second Circuit is not alone in its lack of understanding of the basic policy underlying that program, and other courts have used similar rationales to reach equally bizarre results. See *Genin* v. *Toia,* decision no. 285, slip op (N.Y. Ct. App., July 3, 1979) (allows an adult to receive AFDC although there is no needy dependent child in the AFDC household); *Howard* v. *Madigan,* 363 F. Supp. 351, 353 (D.S. D. 1973); *Matter of Nelson* v. *Toia,* 92 Misc 2d 575, 400 N.Y.S. 2d 427 (Sup. Ct. Chautauqua Co.) affd. 60 A. D. 2d 796 (4th Dept. 1977), mot. for lv. to app. den. 44 N Y 2d 646 (1978). It is respectfully submitted that this Court's clarification of its decision in *Van Lare* and of the applicable law is urgently needed. Cf. *Kentucky* v. *Horton* —— U.S. ——, 47 U.S.L.W. 4579 (May 22, 1979); *Quern* v. *Mandley,* 436 U.S. 725, 733-734 (1978).

POINT II

Requiring the State to assure that the AFDC parent is applying resources provided for the support of her non-recipient minor child, and to prove that the per capita needs of the AFDC recipients in the household have not been increased, violates basic tenets of public assistance programs.

The decision below marks a radical departure from well settled principles regarding the State's discretion under Aid to Families with Dependent Children (AFDC) and confounds the administration of that program.

This Court has long recognized that the states have the "undisputed power . . . to set the level of benefits and the standard of need", and that the practical problems presented in the determination of need do not require a solution of "mathematical nicety". *King* v. *Smith, supra,* at 334; *Dandridge* v. *Williams,* 397 U.S. 471, 478, 485 (1970). The holding below requires the State to determine AFDC needs with mathematical precision.

The District Court's decision granting respondents' motion for partial summary judgment states that if the respondents had been asked whether their non-recipient children's resources were "pooled with the AFDC household money to absorb [those children's] share of food and shelter expenses", and they had replied in the affirmative, then, and only then, would the economies of scale operate to reduce respondents' per capita needs (p. 12a). This approach ignores reality. The manner in which support funds are applied is, by necessity, determined by which items of need must be purchased or paid for on the date that those funds are received. Thus, the non-recipient child's support is invariably used to provide more than his per capita share of some household expenses, and less than or none of his share of other such expenses. The same is true of support resources provided in-kind, such as a freezer or washing machine. The decision below prohibits pro-ration of the AFDC grant in this situation, and leaves the state with the impossible task of calculating unmet AFDC needs item by item.

Moreover, the holding below contravenes a basic tenet of public aid programs, that is, the burden of demonstrating need for public assistance rests with the applicant or recipient, not with the State. See *Lavine* v. *Milne,* 424 U.S. 577 (1976).

Obviously, the recipient alone has first hand knowledge of the amount and application of the resources available to meet the needs of his household. Administrative efficiency (and common sense) therefore requires that the recipient show that his per capita needs have not been affected by the economies of scale when a non-recipient resides in his household. *Hausman* v. *Dept. of Institutions and Agencies,* 64 N.J. 203, 314 A. 2d 362, 366, cert. den. 417 U.S. 955 (1974).

The lower court recognized that if the support payments were applied to meet the portion of the shared household expenses attributable to respondents' non-recipient children, the economies of scale would operate to leave the respondents and their recipient children with the same per capita needs they had when all of the children were receiving AFDC (i.e.: two/thirds of the needs of three for Swift and Michelle, and three/fourths of the needs of four for Roe, Carol, and Cheryl). However, by requiring the State to demonstrate that the support payments are so applied, the lower court has wrongfully placed on the State the burden of proving that respondents' per capita AFDC needs have *not increased.*

The result of the decision is that respondents' per capita AFDC grants have been increased. For example, before respondent Swift informed the local agency that she was in receipt of William's support payments, she received a $200 basic needs grant for her three person household. Two

thirds of that grant ($133.32) was attributable to the needs of Swift and her daughter. She also was eligible to receive her actual rent of $234, of which $156 (two thirds of $234) was attributable to herself and her daughter. As a result of the decision below Swift and her daughter presently receive a basic needs grant of $150, which is a full basic needs grant for a two person household (18 N.Y.C.R.R. § 352.1) and a shelter allowance of $212, which is the maximum shelter allowance, including heat, for a two person household in Westchester County (18 N.Y.C.R.R. § 352.3). Thus Swift and her daughter now receive $72.32 per month more AFDC than they did before the source of William's support was changed. The AFDC grant provided to Roe and her two recipient children has been similarly affected.

Furthermore, placement of this burden on the State is contrary to fundamental evidentiary principles. Since the manner in which the support resources are applied is exclusively within the recipient's knowledge, well settled evidentiary principles require the recipient to come forward with facts to demonstrate that those resources are not being used to meet the per capita needs of the non-recipient child. See 9 J. Wigmore, *Evidence* § 2486, p. 275 (3d Ed. 1940). Respondents have not done so.

As was most recently stated by this Court in *County Court of Ulster County, New York* v. *Allen*, —— U.S. ——, 47 U.S.L.W. 4618 (June 4, 1979), inferences are a staple of the adversarial system of fact finding. The value and validity of these evidentiary devices depends upon the strength of the connection between the fact known and the fact to be proved. See *Id.*, at 4622-4623. In the instant case the known fact is that the father of one of the minor children of an AFDC recipient is providing sufficient resources, over which the recipient has control, to meet the per capita needs of their child. The fact to be proved is that the AFDC parent is applying those resources to meet the per capita needs of the child.

Congress has mandated that when the State knows that an AFDC parent is provided with resources to meet the needs of her child, it must be inferred that those resources are so used, absent any proof to the contrary. See 42 U.S.C. § 606 (b) (2). This Court has dismissed appeals from decisions of the New York Court of Appeals which assumed that public assistance recipients were not misapplying their income. See *Lumpkin* v. *Dept. of Social Services*, 45 N.Y. 2d 351, 408 N.Y.S. 2d 421, 380 N.E. 2d 249 *appeal dismissed for want of a substantial federal question* —— U.S. ——, 57 L. Ed. 2d 700, 99 S. Ct. 713 (1978) (federal educational grant received by AFDC recipient deemed to be used for educational expenses); *Padilla* v. *Wyman*, 34 N.Y. 2d 36, 356 N.Y.S. 2d 3, 312 N.E. 2d 149, *appeal dismissed for failure to state a substantial federal question*, 419 U.S. 1084 (1974) (AFDC funds provided to to two individuals residing with petitioner, a recipient of Old Age Assistance, deemed to be used to meet the portion of the shared household costs attributable to the AFDC recipients).

The State is additionally prohibited from inferring that respondents are not applying the support resources for their intended purpose by the fact that such behavior by respondents constitutes a crime under New York Law. See New York Penal Law § 260.05. It may also consitute neglect. See New York Family Court Act § 1012 (f).

The decision below forces the State to provide AFDC funds in excess of the State determined standard of need to thousands of recipients who reside with non-recipient minor children receiving support from non AFDC sources. The overpayment to plaintiff Swift alone exceeds $72 per month. Multiplied by thousands of affected recipients, the cost of that decision is prohibitive. The public fisc is a limited resource. New York is not required to provide the high percentage of State determined need that it provides today, and any reduction in that percentage

would seriously harm those recipients who are not able to participate in the windfall provided by the decision of the lower court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
July 19, 1979

Respectfully submitted,

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APPENDIX A—Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 893—August Term, 1978.

(Argued April 19, 1979 Decided April 25, 1979.)

Docket No. 79-7052

JOANNE SWIFT, Individually and on behalf of her minor daughter, Michelle Swift, and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

LYLIA ROE,

Plaintiff-Intervenor,

—against—

BARBARA BLUM, Individually and as Commissioner of the New York State Department of Social Services, PHILIP L. TOIA, CHARLES W. BATES, Individually and as Commissioner of the Westchester County Department of Social Services, JOHN BATTISTONI, Individually and as Acting Commissioner of the Dutchess County Department of Social Services, and GABRIEL T. RUSSO, Individually and as Commissioner of the Monroe County Department of Social Services,

Defendants,

BARBARA BLUM, Individually and as Commissioner of the New York State Department of Social Services, PHILIP L. TOIA, and GABRIEL T. RUSSO, Individually and as

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit.

Commissioner of the Monroe County Department of Social Services,

Defendants-Appellants.

Before:

KAUFMAN, *Chief Judge,* SMITH, *Circuit Judge,*
OWEN, *District Judge.**

Appeal from a judgment of the United States District Court for the Southern District of New York, Henry F. Werker, *District Judge.* The district court enjoined officials of the New York State Department of Social Services from pursuing their policy of pro-rating grants under the program for Aid to Families with Dependent Children when a child receiving support from outside sources sufficient for his own needs resides with an AFDC assistance unit. Also called up for review were interlocutory orders certifying a plaintiff class and denying defendants' motion for judgment on the pleadings.

Affirmed on the opinions of the district court, reported at 461 F. Supp. 578 and 450 F. Supp. 983.

EILEEN R. KAUFMAN, New Rochelle (Martin A. Schwartz, Westchester Legal Services, Inc., New Rochelle, of counsel), *for Appellees.*

MARION BUCHBINDER, Assistant Attorney General of the State of New York (Robert Abrams, Attorney General, George D. Zuckerman, Assistant

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* Of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit.

Solicitor General, of counsel), *for Appellants Blum and Toia.**

PER CURIAM:

We affirm on Judge Werker's opinions for the district court, reported at 450 F. Supp. 983 and 461 F. Supp. 578.

The only issue requiring additional comment is the State's contention that it does not in fact automatically pro-rate AFDC benefits when a child whose needs are met by non-welfare sources (and thus is not eligible for benefits) resides with the assistance unit. We conclude that Judge Werker correctly determined that there was not a genuine issue as to the existence of this policy. The state did not make an individual determination as to either named plaintiff that her child's income was applied to shared household expenses. Rather, in both cases proration was based solely on a finding that the payments were sufficient to meet the child's portion of those costs. This, in effect, presumed contributions to the household from the mere existence of income, thereby contravening *Van Lare* v. *Hurley,* 421 U.S. 338 (1975), and its implementing regulations, 45 C.F.R. §§ 233.20(a)(2)(viii), 233.90(a).

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* Appellant Russo defaulted on the appellate scheduling order, and his appeal was dismissed by order dated March 9, 1979.

APPENDIX B—Opinion of the United States District Court for the Southern District of New York.

OPINION

77 Civ. 2425 (HFW)

#47938

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOANNE SWIFT, individually and on behalf of her Minor Daughter, MICHELLE SWIFT, and on behalf of all other persons similarly situated,

Plaintiffs,

LYLIA ROE,

Plaintiff-Intervenor,

against

PHILIP L. TOIA, individually and as Commissioner of the New York State Department of Social Services; CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services; JOHN BATTISTONI, individually and as Acting Commissioner of the Dutchess County Department of Social Services; and GABRIEL T. RUSSO, individually and as Commissioner of the Monroe County Department of Social Services,

Defendants.

APPEARANCES (See last page):

HENRY F. WERKER, D.J.

Plaintiffs move for partial summary judgment in this

Appendix B—Opinion of the United States District Court for the Southern District of New York.

class action[1] alleging violations of their constitutional rights through defendant's policy of prorating public assistance grants when an individual who has no legal obligation to support a family receiving Aid to Families With Dependent Children ("AFDC"), and who receives non-welfare income sufficient to meet his or her own needs, resides with an AFDC family composed of a parent or caretaker relative and at least one needy child. The basis of the motion is that this practice or policy of proration violates the Social Security Act ("SSA") and regulations promulgated thereunder.

FACTS

Plaintiff Swift resides in Larchmont, New York with her minor children Michelle, age four, and William Rooney, age eleven. Mrs. Swift and Michelle are AFDC public assistance recipients; William receives $150 per month from his father, plaintiff's former husband, under a support order and is thus ineligible for public assistance.

From May, 1975 until November, 1975, Mrs. Swift received an AFDC grant of $398 monthly for a household of three. This included $198 for plaintiff's actual rent[2] plus a $200 basic needs allowance for three people. After plaintiff informed the Westchester County Department of Social Services that she was in receipt of William's monthly support payments her grant was recomputed as $289.34. This figure represented a $234 rent allowance for her then actual rent for a household of three, plus a $200 basic needs allowance for a three person household, for a total of $434. $144.66 of William's $150 monthly support payment was then deducted, leaving Mrs. Swift with the $289.34 figure. The $144.66 deduction represented the actual amount of William's per capita monthly needs;[3] thus the final $289.34 grant represened two-thirds of the

basic shelter and needs allowance for a three person household. Plaintiff contends that William should not be included in her household and that the proper amount of her AFDC grant should be $362, consisting of a $150 basic needs allowance for two people plus a $212 maximum rent allowance for two[4] rather than two-thirds of the grant for a three person household.[5]

Plaintiff Roe resides in Rochester, New York with her minor daughters Carol, age 8, Cheryl, age 8 and Ann Marie Gauck, age 1. Plaintiff, Carol, and Cheryl are AFDC recipents; Ann Marie is supported by her father and does not receive public assistance. Prior to June 1, 1977 Ms. Roe and all three daughters were in receipt of a monthly AFDC public assistance grant of $450 from the Monroe County Department of Social Services. This sum represented a $192 rent allowance for four persons plus a $258 basic needs allowance for four persons. When in May of 1977 Thomas Gauck agreed to support his daughter Ann Marie, Ms. Roe notified the Monroe County Department of Social Services and requested that Ann Marie be removed from the grant. Ms. Roe was then advised that the family's public assistance grant would be reduced from $450 per month to $337.50 per month. The new figure was computed as three-quarters of a grant for four persons, *i.e.*, three quarters of $450 = $337.50. Thus the Department of Social Services subtracted one fourth, $112.50, of the family's previous grant for four, and assigned that figure as Ann Marie's support that was provided by her father. This was done despite the fact that Thomas Gauck does not provide a fixed or regular amount of support to Ann Marie, but instead provides for her by purchasing clothing and other items that the child needs. Roe affid. at 4. Plaintiff argues that Ann Marie should not be included in her household and that the proper amount of her AFDC grant should be $381, consisting of

a basic needs allowance of $200 for three persons plus a $181 rent allowance for three instead of three-quarters of the grant for a four person household.

Plaintiffs Swift and Roe argue for themselves and the remaining class members that defendants' policy of prorating family grants without proof of any actual income contribution by the independently supported child to the AFDC unit violates the SSA and federal implementing regulations because it incorporates a blanket assumption that a non-legally responsible individual is contributing to the AFDC household, or that his or her presence creates a reduced need due to economies of scale without an inquiry into the facts of the particular case.

Discussion

"Summary judgment is a harsh remedy to be granted only where there are no material issues of fact to be tried." *FLLI Moretti Cereali* v. *Continental Grain Co.*, 563 F.2d 563, 565 (2d Cir. 1977). The function of the court is not to try issues of fact but to determine whether those issues exist to be tried. *Heyman* v. *Commerce and Industry Insurance Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975). In so doing the court must resolve all ambiguities in favor of the non-moving party. *Id.* at 1320.

In the present case the material facts are not disputed; the court is asked to resolve, as a matter of law, the propriety of defendants' actions. Defendants do not deny that plaintiffs' grants were prorated as described above but contend that proration of a family grant on account of the presence of a self-maintaining child is proper under an economies of scale theory. They rely upon Bureau of Labor statistics[6] that reflect variations in per capita living costs according to changes of household size and contend that no attribution of income from the non-

legally responsible individual to the AFDC household is involved. Rather, they state that "[a]ll that is assumed by the Department is that the economies of scale which are embodied in the standard of need will continue to operate regardless of the source of the child's sustenance." Cushing affid. at 7.

An argument similar to that of the present defendants was posed in *Houston Welfare Rights Organization, Inc.* v. *Vowell,* 555 F.2d 1219 (5th Cir. 1977), *cert. granted,* 534 U.S. 1061 (1978). There plaintiffs challenged the state of Texas' Department of Public Welfare's policy of prorating shelter and utility expenses when a non-AFDC recipient shared a recipient's residence. Plaintiffs argued that the proration violated federal regulations and in particular 45 C.F.R. § 233.90(a) which deals with the administration of AFDC programs. Section 233.90(a) provides that when the amount of the assistance payment is calculated, only actually available net income, received on a regular basis, is to be considered; and that income of the parent only will be deemed available for children in the household absent proof of actual contributions.

The DPW, in answer to plaintiffs' claim, contended that its proration policy did not presume income to the AFDC recipient in contravention of section 233.90(a) but rather only a reduced need due to the nonrecipient's presumed contribution of funds to cover his own expenses, coupled with economies of scale achieved through group living. 555 F.2d at 1222-23. The court rejected this position and stated that the economies of scale argument implicitly presumed that the non-AFDC recipient's income was available to offset utility and shelter expenses. *Id.* at 1224. Thus, the court concluded, the "proration policy, in presuming that a recipient's need decreases when a nonrecipient resides in the household, violates federal regulations controlling state administra-

tion of AFDC programs because his need of assistance does not decrease unless the nonrecipient is paying his own way." *Id.*

45 C.F.R. § 233.90(a), relied upon in *Houston Welfare Rights Organization, Inc., supra,* and 45 C.F.R. § 233.20 were amended in 1977 after the decision in *Van Lare* v. *Hurley,* 421 U.S. 338 (1975). In *Van Lare* the Supreme Court invalidated a New York State regulation requiring shelter allowances of AFDC families to be reduced prorata when a non-legally responsible individual resided with the AFDC family. The Court determined that the proration regulations were invalid "insofar as they are based on the assumption that the nonpaying lodger is contributing to the welfare household, *without inquiry into whether he in fact does so.*" 421 U.S. at 346 (emphasis supplied). To conform to the Court's holding in *Van Lare* the AFDC implementing regulations now provide in relevant part:

> § 233.20 Need and amount of assistance.
>
> (a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:
>
> * * *
>
> (2) Standards of assistance.
>
> (iv) Include the method used in determining need and the amount of the assistance payment.
>
> * * *
>
> (viii) *Provided that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit.*

45 C.F.R. § 233.20 (1977) (emphasis supplied).

§ 233.90 Factors specific to AFDC.

(a) *State plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural, adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income of the State; *nor may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from nonlegally responsible individuals living in the household. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.*

45 C.F.R. § 233.90 (1977) (emphasis supplied). As I indicated in an earlier decision in this action, *Swift* v. *Toia,* 450 F. Supp. 983, 989 (S.D.N.Y. 1978) the comments of the Department of Health, Education and Welfare ("HEW") on the above regulations make perfectly clear that the regulations require a state, before reducing AFDC allowances pro-rata, "to determine whether actual contributions have been made" to the AFDC recipients by the non-legally responsible individual residing in the AFDC home. 42 Fed. Reg. 6583.

Plaintiff Swift has submitted a sworn affidavit stating that at the New York State Department of Social Services Fair Hearing to review her prorated grant, no evidence was adduced that her self-sustaining son William was furnishing support or contributions to her, or that her needs had diminished due to his presence in the household. Swift affid. at 3. Indeed, the hearing transcript reveals that the Westchester County Department of Social Services justified the grant proration on the basis that *Van Lare* v. *Hurley's* prohibition against assuming that the non-legally responsible person's income is used to meet the needs of the AFDC household was inapplicable to a family group situation where the non-welfare child is in fact self-supported. This position appears to conflict, however, with HEW's comments concerning §§ 233.20 and 233.90. When four state agencies submitted that *Van Lare* and the regulations applied only to the "man-in-the-house" situations rather than all shared households, HEW flatly rejected such a position and noted that it perceived "no basis for making a distinction between non-legally liable individuals depending on where the [AFDC] child's home is." 42 Fed. Reg. 6583.

Plaintiff Roe has also submitted a sworn affidavit concerning her fair hearing on her family's grant proration. It reveals that she testified, as noted above, that Ann

Marie's father provides for the child's needs by purchasing her clothing and other necessary items; he does not provide a fixed monetary sum or a regular amount of support for her. At the hearing no evidence was introduced that Ann Marie was contributing to the AFDC household or that the needs of Ms. Roe and her other two daughters had diminished due to Ann Marie's presence. Roe affid. at 4. In the decision after fair hearing the grant proration was upheld without any findings of actual contribution to the AFDC household.

It is clear from the above that in neither instance did defendants make the requisite inquiry of whether the independently supported child's resources were actually contributed to the household. Without such a threshold determination, it is difficult, if not impossible, to understand how economies of scale come into play. If Mrs. Swift had been asked whether $144.66 of William's monthly support payment is pooled with the AFDC household money to absorb his share of food and shelter expenses, and if she answered in the affirmative, the defendants would have been perfectly justified in prorating her grant. At that point the federal regulations would have been satisfied,[7] and economies of scale would operate to reduce the overall cost of maintaining a three person household.

Turning next to Ms. Roe's factual situation, the lack of inquiry as to actual contribution to the household may result in genuine hardship to the AFDC recipients where the non-AFDC child is suported in kind rather than with funds. For example, if Ann Marie's father provides her monthly with actual items of food and clothing, but no monetary sum that is actually contributed to the AFDC unit, it is wholly artificial to maintain that the cost of running a four person household is reduced by one quarter, *i.e.*, $112.50 per month, Ann Marie's state determined total needs as one person of four. In such an instance reality dictates that

the remaining family members, the AFDC household of three, require a full shelter allowance for three people in addition to a basic needs allowance for three people.[8]

Over and above the two plaintiffs' situations, there are undoubtedly countless factual permutations among the class members where the non-AFDC child's support arrangement consists of support in kind only, or support which is given partially in kind and partially in funds, or simply support in whatever monetary amount an absent parent can spare on a monthly basis. The only way to ensure that the prorated amount of the non-AFDC child's per capital needs is actually available and contributed to the AFDC unit to cover the non-AFDC child's share of household expenses is to comply with sections 233.20(a) and 233.90(a) through inquiry in each instance. A similar determination has also been reached by other courts presented with proration issues in differing contexts. *See, e.g., Houston Welfare Rights Organization, Inc.* v. *Vowell, supra; Gurley* v. *Wohlgemuth,* 421 F. Supp. 1337 (E.D. Pa. 1976) (two AFDC units residing in one household); *see also Reyna* v. *Vowell,* 470 F.2d 494, 497 (5th Cir. 1972) (SSA requires determination of whether earned income of resident 18-21 year old is contributed to household before reduction in AFDC benefits); *cf. Gilliard* v. *Craig,* 331 F. Supp. 587 (W.D.N.C. 1971) *aff'd* 409 U.S. 807 (1972) (although no discussion of instant issue, *i.e.,* deduction from AFDC grant to extent of state determined standard of need for supported child, Court determined that full amount of child's support could not be assumed available to AFDC unit). Finally, defendants' reliance on *Padilla* v. *Wyman,* 34 N.Y.2d 36, 312 N.E.2d 149, 356 N.Y.S.2d 3, *appeal dismissed,* 419 U.S. 1084 (1974) is not considered dispositive for the reasons stated in *Swift* v. *Toia,* 450 F. Supp. at 989-90.

In accordance with the above, plaintiffs' motion for partial summary judgment is granted. Defendants' practice

or policy as outlined above conflicts with the discussed federal implementing regulations of the SSA and as such is violative of the supremacy clause of the constitution. Plaintiffs are directed to submit a judgment enjoining defendants from prorating the class members' AFDC grants without first determining whether the non-AFDC child's monthly support, in the amount of the per capita state determined standard of need, is actually available and contributed to the household to defray the non-AFDC child's share of household expenses.

So Ordered.

Dated: New York, New York
November 30, 1978

Henry F. Werker
U.S.D.J.

NOTES

[1] This suit has been the subject of two prior opinions, *Swift* v. *Toia*, 450 F. Supp. 983 (S.D.N.Y. 1978) (motion to dismiss) and —— F. Supp. —— (S.D.N.Y. 1978) (class certification motion). For purposes of this opinion familiarity with those decisions will be assumed.

The class is defined as

> "persons who are residents of the State of New York, who are, were, or will be recipients of AFDC and whose grants have been, are being, or are threatened to be reduced, modified or suspended pursuant to defendants' policy of prorating the public assistance grant when an individual who has no legal obligation to support the AFDC family and who receives non-welfare income sufficient to meet his or her needs resides with an AFDC family consisting of a parent or caretaker relative and at least one needy child."

—— F. Supp. at ——

[2] 18 N.Y.C.R.R. § 352.3 (1978) provides for a maximum rent allowance of $259 monthly for a three person household or the actual amount of rent paid, whichever is less.

[3] The New York State Department of Social Services computes per capita standards of need based upon the United States Department of Labor's living standards. These are incorporated into Bureau of Labor statistics which vary according to household size. Cushing affid. at 5.

[4] 18 N.Y.C.R.R. § 352.3 (1978) provides for a maximum rent allowance of $212 monthly for a two person household or the actual amount of rent paid, whichever is less.

[5] At the time of the pendency of this motion, counsel reported to the court that Mrs. Swift was in receipt of a monthly grant of $362 to be reduced to $289.33 per month effective October 1, 1978.

[6] *See* note 3 *supra.*

[7] HEW has stated that what constitutes "proof of actual contributions" is a determination to be made by state welfare agencies. 42 Fed. Reg. 6583.

[8] Defendants make much of the fact that Ms. Roe (a) lives in a building owned by Ann Marie's father and (b) testified at her fair hearing that Ann Marie's father provides Ann Marie with anything she actually needs and has purchased a washing machine and a freezer. These facts, standing alone, do not detract from plaintiffs' legal arguments. If Ann Marie is in fact contributing to the AFDC household through her father's support obligations then the AFDC grant may and should be properly prorated. However, without such a preliminary determination (and defendants do not contend that they have made this determination), (a) and (b) above are irrelevant.

APPENDIX C—Memorandum Decision of the United States District Court for the Southern District of New York Denying Petitioner Toia's Motion for Judgment on the Pleadings.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM DECISION

77 Civ. 2425 (HFW)

JOANNE SWIFT, individually and on behalf of her minor daughter MICHELLE SWIFT, and on behalf of all other persons similarly situated,

Plaintiffs,

against

PHILIP L. TOIA, individually and as Commissioner of the New York State Department of Social Services and CHARLES BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Defendants.

APPEARANCES (See last page):

HENRY F. WERKER, D.J.

Plaintiff Swift instituted suit on her own behalf and on behalf of her daughter against defendants Toia, Commissioner of the New York State Department of Social Services and Bates, Commissioner of the Westchester County Department of Social Services, in their official and individual capacities. She seeks injunctive and declaratory relief and monetary damages in this action brought pur-

suant to 42 U.S.C. § 1983[1] and directly under the fourteenth amendment. Jurisdiction is predicated upon 28 U.S.C. §§ 1343(3) and 1331.

The complaint alleges a violation of constitutional rights through defendants' policy of prorating public assistance grants when an individual who has no legal obligation to support a family receiving Aid to Families With Dependent Children ("AFDC"), and who receives non-welfare income sufficient to meet his or her own needs, resides with an AFDC family composed of a parent or caretaker relative and at least one needy child. Specifically, plaintiff alleges that this policy (1) is violative of the Supremacy Clause of Article VI of the United States Constitution and is therefore unconstitutional; (2) violates the due process and equal protection clauses of the fourteenth amendment; and (3) violates plaintiff's rights of privacy and freedom of association as guaranteed by the first, ninth and fourteenth amendments.

There are five motions currently pending which will be considered in this opinion.

FACTS

Mrs. Swift resides in Larchmont, New York with her minor children Michelle, age four and William Rooney, age eleven. Plaintiff and her daughter receive public assistance in the form of AFDC through the Westchester County Department of Social Services. This AFDC grant is plaintiff's sole source of income. William receives $150 per month from his father (plaintiff's former husband) pursuant to a support order and is therefore ineligible for public assistance.

From May, 1975 until November, 1975, plaintiff received an AFDC grant of $398 monthly for a household of three. This figure included a $200 basic needs allowance for three people plus $198 for plaintiff's actual rent[2] during that period of time. After plaintiff informed the Westchester County Department of Social Services that she was in receipt of William's monthly support payments her grant was recomputed to include a $200 basic needs allowance for a three person household plus a $234 rent allowance, which was then her actual rent, for a total of $434. William's $150 monthly support payment was then deducted leaving a grant of $284. Plaintiff contested the grant reduction and an administrative fair hearing was conducted. Subsequently the grant was again recomputed. Instead of deducting the full $150 monthly child support payment from the grant, only $144.66 of that amount per month was deducted. This $144.66 represented the actual amount of William's per capita monthly needs. The final grant therefore was $289.34, representing two-thirds of the basic shelter and needs allowance for a three person household.

Plaintiff contends that William should not be included in her household and that the proper amount of her AFDC grant should be $362, consisting of a $150 basic needs allowance for two people plus a $212 maximum rent allowance for two rather than two-thirds of the grant for a three person household. She argues that defendants' policy of prorating grants without proving any actual income contribution by William to her and Michelle violates the Social Security Act and federal implementing regulations insofar as it incorporates a blanket assumption that a non-legally responsible individual is contributing to the

AFDC household, or that his presence creates a reduced need due to economies of scale without an inquiry into the facts of the particular case.

The Motion to Amend

Plaintiff has moved to amend the complaint pursuant to Fed. R. Civ. P. 15(a) to conform class action allegations to defendants' policy as set forth in defendants' affidavit in opposition to plaintiff's class certification motion. Defendants oppose the amendment and contend that they are entitled to judgment on the pleadings under Fed. R. Civ. P. 12(c) under either the original or amended complaint. However, since I have concluded for the reasons set forth below that defendants are not entitled to judgment on the pleadings, and that defendants will not be prejudiced by such an amendment, this is a proper instance in which leave should be freely given. *See Foman* v. *Davis,* 371 U.S. 178, 182 (1962); *Gumer* v. *Shearson, Hammill & Co.,* 516 F.2d 283, 287 (2d Cir. 1974); 6 C. Wright & A. Miller, Federal Practice and Procedure § 1473 (1971). Accordingly, the motion for leave to file an amended complaint is granted.

The Motion for Judgment on the Pleadings

Defendants have moved for judgment on the pleadings. The first ground asserted is lack of subject matter jurisdiction under 28 U.S.C. §§ 1343(3) and 1331.

It is well settled that "municipal and state officials, sued in their official capacities, are 'persons' within the meaning of § 1983 when they are sued for injunctive or declaratory

relief." *Monell* v. *Department of Social Services of the City of New York,* 532 F.2d 259, 264 (2d Cir. 1976), *cert. granted,* 429 U.S. 1071 (1977), argued Nov. 2, 1977, 46 U.S.L.W. 3304 (U.S. Nov. 8, 1977) (No. 76-1914).

To the extent plaintiff seeks money damages against Toia and Bates in their official capacities, however, she may not prevail. When a state official such as Toia is sued in his official capacity for money damages, the eleventh amendment bars such action since any judgment would necessarily be satisfied from state funds. *See Edelman* v. *Jordan,* 415 U.S. 651, 663 (1974); *Monell,* 532 F.2d at 265. And, since a county is not a "person" for purposes of § 1983 actions, *see City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973); *Moor* v. *County of Alameda,* 411 U.S. 693 (1973); *Monroe* v. *Pape,* 365 U.S. 167 (1961), this court lacks jurisdiction to award money damages against Bates in his official capacity since such award would also necessarily be satisfied from public funds. *See Monell,* 532 F.2d at 265-66.

Plaintiff also asserts a claim for damages against both defendants in their individual capacities. Defendants argue a good faith defense, *see Wood* v. *Strickland,* 420 U.S. 308 (1975); *Sheuer* v. *Rhodes,* 416 U.S. 232 (1974), and on that basis contend that no liability for damages exists against them in their individual capacities. Such an argument is prematurely presented.

Initially it must be determined whether plaintiff may assert personal liability based upon the individual conduct of each defendant. The Second Circuit has recently noted that "[i]t is not necessary for § 1983 liability that the appellees directed any particular action with respect to these specific individuals, only that they *affirmatively* promoted a policy which sanctioned the type of action which

caused the violations." *Duchesne* v. *Sugarman,* 566 F.2d 817, 831 (2d Cir. 1977) (emphasis in original). Under such a rationale of personal accountability for "affirmative policy-making which may have caused the misconduct," *id.,* plaintiff may properly attempt to hold Toia personally liable for damages. Ultimately he will be personally answerable in damages only if "he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [plaintiff]." *Wood* v. *Strickland,* 420 U.S. at 322.

Plaintiff may not attempt to hold Bates personally liable for damages under § 1983 because as county commissioner he does not engage in policy making. Bates as a local commissioner is merely Toia's agent who is bound by both Toia's fair hearing decisions in individual cases and Toia's interpretations of the State Department of Social Services' Regulations. *Samuels* v. *Berger,* 55 App. Div. 2d 913, 914, 390 N.Y.S.2d 445, 446 (2d Dep't 1977); *Bates* v. *Berger,* 55 App. Div. 2d 950, 391 N.Y.S.2d 147, 148 (2d Dep't 1977).

Aside from the above basis of jurisdiction under 28 U.S.C. 1343(3) through a § 1983 claim, plaintiff also attempts to assert a fourteenth amendment claim coupled with an amount in controversy exceeding $10,000, predicating jurisdiction upon 28 U.S.C. § 1331, the general federal question statute. Defendants once again assert a lack of subject matter jurisdiction under § 1331. Although subject matter jurisdiction is lacking under § 1331 as to any claim against Toia in his official capacity by virtue of the eleventh amendment, *see generally* 13 C. Wright & A. Miller, § 3524 (1975), there appears to be jurisdiction as

to Toia in his individual capacity and Bates in his official and individual capacities for purposes of a direct cause cause of action under the fourteenth amendment. *See Gentile* v. *Wallen,* 562 F.2d 193, 196 (2d Cir. 1977); *See also Arthur* v. *Nyquist,* —— F.2d ——, slip op. at 1980 n.9 (Mar. 8, 1978). Whether only equitable relief is available instead of money damages is an open issue in this Circuit. *Gentile* v. *Wallen,* 562 F.2d at 197 n.4; *O'Grady* v. *City of Montpelier,* —— F.2d ——, slip op, at 2131 n.14 (2d Cir. Mar. 27, 1978).

Defendants last argument related to subject matter jurisdiction is that jurisdiction should be declined on the basis that plaintiff's claims are insubstantial. This argument must be rejected. Upon a reading of the complaint it is obvious that plaintiff's arguments are neither so frivolous nor so insubstantial as to be beyond this court's jurisdiction. *Hagans* v. *Lavine,* 415 U.S. 528, 539 (1974).

Having determined that there is subject matter jurisdiction as delineated above to entertain plaintiff's complaint, I will now turn to the balance of defendants' motion for judgment on the pleadings.

Defendants contend that plaintiff has failed to state a claim upon which relief may be granted, because their policy is not violative of the supremacy clause, due process, equal protection or rights to privacy and free association. Specifically they allege that prorating an AFDC grant when a non-legally responsible individual whose needs are actually met by a non-AFDC source resides with an AFDC family consisting of a parent or caretaker relative and at least one child is proper. Defendants base this argument on economies of scale and contend that it incorporates no impermissible attribution of income contribution from the self-sufficient member to the AFDC household.

DISCUSSION

AFDC is a public assistance plan wherein the federal government provides funds to participating states on a matching fund basis to aid the "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with" any statutorily enumerated relatives. 42 U.S.C. 606(a); *Van Lare* v. *Hurley,* 421 U.S. 338, 340 (1975). Any participating state seeking matching federal funds must operate its program in conformity with the Social Security Act (the "Act"). *Van Lare* v. *Hurley,* 421 U.S. at 340. In addition to the Act there exist implementing regulations in the Code of Federal Regulations with which participating states must also comply.

Plaintiff contends that defendants' proration policy violates two such federal regulations which provide as follows:

> § 233.20 Need and amount of assistance.
>
> (a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:
>
> * * *
>
> (2) Standards of assistance.
>
> (iv) Include the method used in determining need and the amount of the assistance payment.
>
> * * *
>
> (viii) *Provided that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in*

the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit.

42 Fed. Reg. 6548 (1977) (to be codified in 45 C.F.R. § 233.20) (emphasis supplied).

§ 233.90 Factors specific to AFDC.

(a) *State plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural, adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State; *nor may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from nonlegally responsible individuals living in the household. In establishing financial eligibility and the amount of the*

assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

42 Fed. Reg. 6584 (1977) (to be codified in 45 C.F.R. § 233.90) (emphasis supplied).

The above regulations were amended after the Supreme Court's decision in *Van Lare* v. *Hurley,* 421 U.S. 338 (1978). There the Court invalidated a New York State regulation requiring the shelter allowance of AFDC families to be reduced pro-rata when a non-legally responsible individual resided with the AFDC family. The Court, citing its prior decisions in *King* v. *Smith,* 392 U.S. 309 (1968) and *Lewis* v. *Martin,* 397 U.S. 552 (1970), construed "federal law and regulations as barring the States from assuming that non-legally responsible persons will apply their resources to aid the welfare child." *Van Lare* v. *Hurley,* 421 U.S. at 347. Consequently the Court found the New York regulations providing for proration of shelter allowance invalid "insofar as they are based on the assumption that the nonpaying lodger is contributing to the welfare household, *without inquiry into whether he in fact does so.*" *Id.* at 346 (emphasis added).

The Department of Health, Education and Welfare ("HEW"), in implementing the above-quoted amendments to conform to the Supreme Court's *Van Lare* decision, responded to comments on the regulations from state and local welfare agencies. In those comments HEW made perfectly clear that the amended regulations require a state, before reducing AFDC allowances pro-rata, "to determine whether actual contributions have been made"

to the AFDC recipients by the non-legally responsible individual living in the AFDC home. 42 Fed. Reg. 6583. Plaintiff alleges that the state failed to make such a determination in her case and that such failure resulted in an impermissible assumption of income contribution from William to her household. Upon a reading of the above amended regulations and HEW's comments thereto, it is clear that such a failure to determine actual contribution to the household before proration conflicts with the federal implementing regulations and does result in an impermissible assumption of income. Defendants protestations to the contrary must fail.

Defendants do not claim that at either plaintiff's administrative fair hearing, or later during the preparation of the decision after fair hearing, that an inquiry as to actual contribtuion from William to the AFDC household was made. Instead they rely on *Padilla* v. *Wyman,* 34 N.Y.2d 36, 312 N.E.2d 149, 356 N.Y.S.2d 3, *appeal dismissed,* 419 U.S. 1084 (1974) for the proposition that a prorated grant for a multiperson household reflects only a decreased per capita cost of needs and no attribution of income contribution by one member of the household to the other. Reliance upon *Padilla* in the present factual context is misplaced, however.

The petitioner in *Padilla* was a recipient of an Old Age Assistance grant of $84 per month. Upon moving in with her daughter and grandchild who were AFDC recipients, her basic needs grant was reduced to $60 per month which was computed on an economies of scale basis. Petitioner challenged the grant reduction on equal protection grounds but did not succeed. The New York Court of Appeals stated:

> The rationale behind the reduction in amount of grants

> to recipients in a multiperson household is not obscure. The amount of a grant is directly related to the measure of a recipient's needs. In a multiperson household the per capita cost of many items, since they are shared, will be less. This consequence involves no attribution of the contribution by any one member of the household to the maintenance of any other member. Each contributes his own share to the reduced pooled costs. Nor is any reduction in the standard of living implied. Accordingly the reduction in petitioner's grant in consequence of her having joined her daughter and granddaughter to form a three-person household has a rational basis and must be sustained.

Id. at 40, 312 N.E.2d at 151, 356 N.Y.S.2d at 5-6 (citations omitted).

The *Padilla* case is clearly distinguishable on its facts. First, it involved a cooperative budgeting situation, that is, a living arrangement where two or more public assistance units reside together. The present case is not such a situation. Secondly, all the household members in *Padilla* were welfare recipients. Hence the issue of an impermissible assumption of income to an AFDC unit by a non-legally responsible individual who receives non-welfare income never arose. Finally, as the *Padilla* court noted, "[f]rom the standpoint of the administration of welfare programs there is a difference of some substance between a family composed entirely of persons on public assistance and one which includes both welfare recipients and self-supporting persons." Consequently *Padilla* cannot be deemed determinative of the issues in this action.

It is apparent from the above that, accepting the allegations of plaintiff's complaint as true, *Conley* v. *Gibson,* 355 U.S. 41 (1967), the defendants are not entitled to judgment

on the pleadings on grounds that plaintiff has failed to state a claim in alleging that their policy of grant proration in her factual situation violates the supremacy clause. Because of this determination I find it unnecessary to address defendants' other arguments in support of their motion. Even if they were to prevail on any one other ground the motion would still necessarily be denied on the basis of the supremacy clause claim which I have sustained.

Intervention Motions

Two proposed plaintiff-intervenors, Cook and Roe, have moved pursuant to Fed. R. Civ. P. 24(b)(2) which permits intervention "when an applicant's claim . . . and the main action have a question of law or fact in common." Both proposed intervenors allege that their AFDC public assistance grants were prorated pursuant to the defendants' policy as alleged by the original plaintiff Swift. They therefore wish to challenge such policy on the same grounds. The facts of the proposed intervenors' situations, although similar to those of plaintiff's situation, are not identical. For purposes of this motion, however, identity of facts is not necessary and it is sufficient that a common question of law is presented. *Davis* v. *Smith*, 431 F. Supp. 1206, 1209 (S.D.N.Y. 1977). On that basis the two motions to intervene are granted. Additionally, the intervenors may add as defendants the county commissioners of the departments of social services for their respective counties pursuant to the permissive joinder provisions of Rule 20(a).[3]

The Class Action Motion

At this juncture the motion for class certification pursuant to Fed. R. Civ. P. 23(a) and (b)(2) must be denied

without prejudice to renew upon submission of data concerning numerosity of the proposed class as defined in the amended complaint.

The proposed class consists of

> "persons who are residents of the State of New York, who are, were, or will be recipients of AFDC and whose grants have been, are being, or are threatened to be reduced, modified or suspended pursuant to defendants' policy of prorating the public assistance grant when an individual who has no legal obligation to support the AFDC family and who receives non-welfare income sufficient to meet his or her needs resides with an AFDC family consisting of a parent or caretaker relative and at least one needy child."

Amended Complaint, ¶ 7.

Upon renewal of this motion the parties may rely upon all legal memoranda previously submitted to the court in addition to any further briefs which they elect to submit.

In accordance with this opinion the motion for leave to file an amended complaint is granted; the motion for judgment on the pleadings is denied; the motions to intervene and add appropriate parties defendant are granted; the motion to maintain a class action is denied without prejudice to renew within twenty days from entry of this decision.

So Ordered.

Dated: New York, New York
May 1, 1978

Henry F. Werker
U.S.D.J.

Appendix C—Memorandum Decision of the United States District Court for the Southern District of New York Denying Petitioner Toia's Motion for Judgment on the Pleadings.

NOTES

[1] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] 18 N.Y.C.R.R. § 352.3 (1977) provides for a maximum rent allowance of $259 monthly for a three person household or the actual amount of rent paid, whichever is less.

[3] The textual discussion concerning the court's subject matter jurisdiction over claims asserted against county commissioner Bates is equally applicable to these additional party defendants.

APPENDIX D—Regulations Involved.

45 C.F.R. § 233.20 Need and amount of assistance.

(a) *Requirement for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

* * *

(2) Standards of assistance.

(iv) Include the method used in determining need and the amount of the assistance payment.

* * *

(viii) Provided that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit.

45 C.F.R. pp. 148-149 (1977)

§ 45 C.F.R. § 233.90 Factors specific to AFDC.

(a) *State Plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the pres-

ence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State; nor may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from nonlegally responsible individuals living in the household. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

45 C.F.R. p. 160 (1977)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-101

BARBARA BLUM, Individually and as Commissioner of the New York State Department of Social Services, and PHILIP L. TOIA,

Petitioners,

against

JOANNE SWIFT, Individually and on behalf of her minor daughter, MICHELLE SWIFT, and on behalf of all other persons similarly situated,

Respondents,

LYLIA ROE, Individually and on behalf of her minor children, CAROL ROE and CHERYL ROE,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Page

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LYLIA ROE, Individually and on behalf of her minor children, CAROL ROE and CHERYL Roe,

Intervenor-Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. The opinion of the Second Circuit is reported at 598 F.2d 312 (2d Cir. 1979).

QUESTION PRESENTED

Whether the Court of Appeals correctly held that the automatic reduction of AFDC assistance, when a non-legally responsible, self-maintaining individual resides with an AFDC family, violates the federal Social Security Act and implementing HEW regulations as construed in VanLare v. Hurley, 421 U.S. 338 (1975) and Lewis v. Martin, 397 U.S. 397 (1969).

REGULATIONS INVOLVED

Sections 233.20(a)(2)(viii) and 233.90(a) of Chapter II, Title 45 of the Federal Regulations provide in relevant part that:

> "...the money amount of any item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit." 45 C.F.R. §233.20(a)(2)(viii).

> "nor may the state agency prorate or otherwise reduce the money amount for any item included in the standard on the basis of assumed contributions from non-legally responsible individuals living in the household." 45 C.F.R. §233.90(a).

STATEMENT OF THE CASE

This action contests the validity of a New York Department of Social Services' policy of automatically prorating and thus automatically reducing an AFDC family's public assistance grant when a non-legally responsible, self-maintaining individual resides with the AFDC family. New York sought to carry out and defend this policy despite this Court's decisions in VanLare v. Hurley, 421 U.S. 338 (1975) and Lewis v. Martin, 397 U.S. 552 (1970), and despite the fact that the policy is specifically prohibited by HEW regulations, 45 C.F.R. §§233.20 (a)(2)(viii) and 233.90(a).

Respondent Swift and her minor daughter

are recipients of AFDC assistance. For a family of two with a rent of $212 per month, New York generally provides a monthly assistance grant of $362.* However, pursuant to the contested policy, Ms. Swift and her daughter only receive AFDC assistance of $289.34 per month (2/3 of a grant

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* $362 represent the basic standard of needs allowance for a family of two of $150, plus a rental allowance of $212. Section 131-a of the New York Social Services Law provides:

> "The following schedule shall be the standard of monthly need for determining eligibility for all categories of assistance in and by all social services districts:
>
> Number of Persons In Household
>
> | One | Two | Three | Four | Five | Six |
> |---|---|---|---|---|---|
> | $94 | $150 | $200 | $258 | $318 | $368 |
>
> [This schedule does not include allowances for rent]."

Pursuant to 18 N.Y.C.R.R. §352.3(a), a family is entitled to an additional allowance for shelter. A family of two residing in Westchester County is entitled to a shelter allowance equal to the rent paid up to a maximum of $212 per month.

for a family of three). The AFDC grant is reduced by $72 per month solely because Ms. Swift's son, William Rooney, who receives support payments from his father, resides with Ms. Swift and her daughter. (5a-6a).*

Similarly, the AFDC grant of respondent Roe and her two daughters was reduced by $43.50 per month because her third daughter, Ann Marie, who receives in kind support from her father, resides in the home. (6a-7a). If William and Ann Marie moved out of their respective households, the Swift and Roe families would receive full grants of AFDC assistance.

Petitioners only discuss the validity of their policy as applied to self-maintaining children who receive support payments. The Courts below, however, found that

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* References are to the Appendix to the Petition for a Writ of Certiorari.

petitioners were carrying out a policy of automatically prorating and reducing AFDC grants when "an individual, who has no legal obligation to support the AFDC family and who receives non-welfare income sufficient to meet his or her needs, resides with an AFDC family...." (Judgment of the District Court, entered December 15, 1978). (emphasis added).* Thus, petitioners' policy is not limited to self-maintaining children, but includes any self-maintaining individual, and is not limited to that individual's receipt of support payments, but includes the receipt of any non-welfare income.

In two separate opinions rendered by

---

* The scope of the policy is reflected in the class certified by the district court. (14a). The petition for certiorari does not contest the class certified by the district court or the findings by the courts below as to the nature or scope of the contested policy.

the district court, and in an opinion by the Court of Appeals, petitioners' policy was found to conflict with the federal Social Security Act and implementing HEW regulations. Swift v. Toia, 598 F.2d 312 (2d Cir. 1979), aff'g, 450 F.Supp. 983 (S.D.N.Y. 1978) and 461 F.Supp. 578 (S.D. N.Y. 1978). (1a-30a). Each decision fully considered petitioners' contentions and found them foreclosed by the applicable HEW regulations and by this Court's decision in VanLare v. Hurley, 421 U.S. 338 (1975).

The decision of the court of appeals only prohibits petitioners from automatically prorating and reducing the AFDC grant when an individual, who has no legal obligation to support the AFDC family and who receives non-welfare income sufficient to meet his or her needs, resides with the AFDC family. Petitioners are not prohibited from reducing the AFDC grant after determining "(1)

the actual amount of contributions, if any, that the AFDC household receives from the non-legally responsible person who resides in the AFDC household, or (2) the actual amount of decreased need, if any, of the AFDC household, resulting from the presence of the non-legally responsible person." (Judgment of the District Court, entered December 15, 1978, p.4).* In addition, the judgment does not enjoin petitioners from enforcing any State statute or regulation, but only the policy of automatic proration.

Petitioners have made no attempt to demonstrate that this case meets any of this Court's criteria for the granting of

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* The decision below simply requires petitioners to make the necessary determinations. Neither the judgment of the district court nor the opinions below place an evidentiary burden on petitioners when they make this determination. See Point iv, infra.

certiorari. U.S.Sup.Ct. Rule, 19. Petitioners have made no attempt to show that the decision of the Court of Appeals is in conflict with the decision of another court of appeals, that it conflicts with applicable decisions of this Court, or that the case presents a substantial question of recurring importance. Petitioners have not cited even one decision that supports the validity of their policy.

Rather, petitioners make the unfounded, unsubstantiated and exaggerated claim that the decision below will create an 'administrative nightmare" and will require the expenditure of "prohibitive" costs. (Petition for a Writ of Certiorari, pp. 9, 13). Similar claims were made by the petitioners

in VanLare v. Hurley, supra.* They were not relevant in that case. They are not relevant here.

The decision of the court below is in accord with this Court's decisions in VanLare v. Hurley, supra, and Lewis v. Martin, supra, is mandated by the applicable HEW regulations, 45 C.F.R. §§233.20 (a)(2)(viii) and 233.90(a), and is consistent with the decisions of the other circuits. See Hoehle v. Likins, 538 F.2d 229 (8th Cir. 1976), aff'g, 405 F.Supp. 1167 (D.Minn. 1975); Houston Welfare Rights Org. v. Vowell, 555 F.2d 1219 (5th Cir. 1977), rev'd and remanded on other grounds,

* In VanLare v. Hurley, supra, the State Commissioner argued that "were the decision of the three-judge district court to be affirmed, appellants estimate that they would be obliged to increase shelter allowance payments by approximately $6.2 million annually." Reply Brief for Appellants in VanLare v. Hurley, p. 7, fn.

99 S.Ct. 1905 (1979); Reyna v. Vowell, 470 F.2d 494 (5th Cir. 1972). See also, Gilliard v. Craig, 331 F.Supp. 587 (W.D. N.C. 1971)(three-judge court), aff'd, 409 U.S. 807 (1972). In addition, petitioners continue to defend the validity of their policy in this Court despite the fact that it has been held invalid as a matter of state law by the New York State courts. Snowberger v. Toia, 46 N.Y.2d 803 (1978); Nelson v. Toia, 92 Misc.2d 575 (N.Y.Sup.Ct.), aff'd, 60 App.Div.2d 796 (4th Dept. 1977), mot. for lv.to app.den., 44 N.Y.2d 646 (1978). Accord, Genin v. Toia, __N.Y.2d__ (July 3, 1979).* Plenary review is thus clearly unwarranted.

* The decision in Genin v. Toia, is reproduced in Appendix "A" to this Brief.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE CONTESTED POLICY VIOLATES EXPLICIT HEW REGULATIONS AND THIS COURT'S DECISIONS IN VANLARE v. HURLEY, 421 U.S. 338 (1975) AND LEWIS v. MARTIN, 397 U.S. 552 (1970).

The primary purpose of the AFDC program is the protection of needy and dependent children. King v. Smith, 392 U.S. 309 (1968). This Court and HEW have consistently recognized that state policies which work an automatic reduction of AFDC benefits because of the presence in the home of a non-legally responsible person frustrate this purpose because they are based on assumed rather than the actual availability of income. VanLare v. Hurley, 421 U.S. 338 (1975); Lewis v. Martin, 397 U.S. 552 (1970).

The courts below correctly found that the contested State policy violates the express terms of two HEW regulations. HEW regulations specifically provide that "the

money amount of any item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual, ..." 45 C.F.R. §233.20 (a)(2)(viii). They also provide that the states may not "prorate or otherwise reduce the money amount for any item included in the standard on the basis of assumed contributions from non-legally responsible individuals living in the household." 45 C.F.R. §233.90(a).

In its preamble to these regulations, HEW explained that they were mandated by this Court's decision in VanLare v. Hurley, supra, and that it was necessary to specifically prohibit proration because "prorating the standard of need is another form of assumption of income from non-legally responsible individuals which has long been prohibited by federal regulations and

by the U.S. Supreme Court in case of King v. Smith, Lewis v. Martin, et al." 42 Fed.Reg. 6583 (Feb. 3, 1977). In addition, HEW made it clear that its regulations apply to all shared households and not just to those containing a "man-in-the-house" or a "lodger." Id. "In VanLare, only one of the three petitioners could be considered to be sharing living arrangements with a man-in-the-house; of the other two, one was sharing with a sister, one with an adult son." Id.; VanLare v. Hurley, supra, at 340, n.1.

This Court's decision in VanLare v. Hurley, supra, is therefore clearly controlling in the instant case. As in VanLare, the vice of the contested policy herein is New York's automatic reduction of the AFDC grant because of the presence of a self-maintaining, non-legally responsible person in the AFDC household,

without determining whether or not that person is using his or her income for shared household expenses, or whether or not the household's needs have decreased.

Petitioners attempt to distinguish VanLare by asserting that, in the case at bar, petitioners only presume contribution when the non-legally responsible individual actually has income. But whether or not the "lodger" had income was irrelevant to this Court's decision in VanLare. Rather, the New York "lodger" regulations were held invalid in VanLare because they were "based on the assumption that the non-paying lodger is contributing to the welfare household, without inquiry into whether he in fact does so." VanLare v. Hurley, supra at 346. (emphasis added). Moreover, in Lewis v. Martin, supra, this Court held that the income of a person with no legal obligation to support the AFDC family cannot, absent proof of actual

contributions, serve as a basis for the reduction of the AFDC grant. And, in Gilliard v. Craig, 409 U.S. 807 (1972), aff'g, 331 F.Supp. 587 (W.D.N.C. 1971), this Court affirmed a decision of a three-judge district court which held that the states may not assume that support payments of a non-needy child are available to meet the needs of the AFDC family with whom he resides. See also, Johnson v. Harder, 383 F.Supp. 174 (D.Conn. 1974), aff'd, 512 F.2d 1188 (2d Cir. 1975), cert. denied, 423 U.S. 876 (1975).

The harm caused by automatic proration is well illustrated by the case of respondent Roe, whose daughter Ann Marie receives in kind support, rather than cash, from her father. As the district court stated:

> "the lack of inquiry as to actual contribution to the [Roe] household may result in genuine hardship to the AFDC recipients where the non-AFDC child is supported in kind rather than

> with funds. For example, if Ann Marie's father provides her monthly with actual items of food and clothing, but no monetary sum that is actually contributed to the AFDC unit, it is wholly artificial to maintain that the cost of running a four-person household is reduced by one quarter, i.e., $112.50 per month, Ann Marie's state determined total needs as 1 person of 4. In such an instance, reality dictates that the remaining family members, the AFDC household of three, require a full shelter allowance for three people in addition to a basic needs allowance for three people." Swift v. Toia, 461 F.Supp. 578, 583 (S.D.N.Y. 1978). (12a-13a).

Moreover, "there are undoubtedly countless factual permutations among the class members where the non-AFDC child's support arrangement consists of support in kind only, or support which is given partially in kind and partially in funds, or simply support in whatever monetary amount an absent parent can spare on a monthly basis." Swift v. Toia, supra at 583. (13a).

Since the decision of the Court of

Appeals merely held that the contested state policy violated explicit federal regulations, plenary review should be denied. Gilliard v. Craig, 331 F.Supp. 587 (W.D.N.C. 1971), aff'd, 409 U.S. 807 (1972); Hausman v. Department of Institutions and Agencies, 64 N.J. 203, 314 A.2d 362, cert. denied, 417 U.S. 955 (1974).

II. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE DECISIONS OF THE LOWER FEDERAL AND STATE COURTS.

The decision of the Court of Appeals simply follows a consistent line of federal and state court decisions.

The decision of the Second Circuit is in accord with the decisions of all of the Circuits which have considered the issue. Hoehle v. Likins, 538 F.2d 229 (8th Cir. 1976), aff'g, 405 F.Supp. 1167 (D.Minn. 1975); Houston Welfare Rights

Org. v. Vowell, 555 F.2d 1219 (5th Cir. 1977), rev'd and remanded on other grounds, 99 S.Ct. 1905 (1979); Reyna v. Vowell, 470 F.2d 494 (5th Cir. 1972); Rodriguez v. Vowell, 472 F.2d 622, 627 (5th Cir.), cert. denied, 412 U.S. 944 (1973); Roselli v. Affleck, 508 F.2d 1277, 1282 (1st Cir. 1974). It is also consistent with all of the applicable decisions of the federal district courts, Mothers and Childrens Rights Org. v. Stanton, 371 F.Supp. 298 (N.D.Ind. 1973); Howard v. Madigan, 363 F.Supp. 351 (D.S.D. 1973); Gilliard v. Craig, 331 F.Supp. 587 (W.D.N.C. 1971), aff'd, 409 U.S. 807 (1972); Jenkins v. Georges, 312 F.Supp. 289 (W.D.Pa. 1969) (three-judge court), and the highest courts of New Jersey, Hausman v. Department of Institutions and Agencies, 64 N.J. 203, 314 A.2d 362, cert. denied, 417 U.S. 955 (1974); and New York, Snowberger v. Toia,

46 N.Y.2d 803 (1978); Matter of Nelson v. Toia, 92 Misc.2d 575 (N.Y.Sup.Ct.), aff'd, 60 A.D.2d 796 (4th Dept. 1977), mot.for lv.to app.den., 44 N.Y.2d 645 (1978). There are no decisions in conflict with that of the court below.*

III. PLENARY REVIEW IS UNWARRANTED BECAUSE THE CONTESTED POLICY HAS BEEN HELD INVALID AS A MATTER OF STATE LAW.

Petitioners continue to defend their

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* Padilla v. Wyman, 34 N.Y.2d 36, appeal dismissed, 419 U.S. 1084 (1974) deals with the distinguishable "cooperative budgeting" situation of two welfare families who reside in the same residence. The New York State Court of Appeals ruled that the State regulation governing that situation did not violate the equal protection clause. The Court of Appeals clearly distinguished the case of two welfare families living together from the instant case of a non-recipient residing with a welfare family. Padilla v. Wyman, supra at 421. This Court's summary dismissal of the appeal in Padilla only indicates this Court's agreement with that specific holding. Illinois State Board of Elections v. Socialist Workers Party, 99 S.Ct. 983, 989-990 (1979).

policy in this Court despite the fact that it has been held invalid as a matter of state law by the New York State courts. Snowberger v. Toia, 46 N.Y.2d 803 (1978), aff'g, 60 App.Div.2d 783 (4th Dept. 1977); Nelson v. Toia, 92 Misc.2d 575, aff'd, 60 App.Div.2d 796 (4th Dept. 1977), leave to app. den., 44 N.Y.2d 646 (1978). Accord, Genin v. Toia , __N.Y.2d__ (July 3, 1979).* In Nelson v. Toia, supra, the precise policy at issue in the instant case was held invalid as a matter of state law as applied to facts literally indistinguishable from those involved herein. The New York State courts have consistently invalidated petitioners' repeated efforts to impose automatic proration schemes. Matter of Zaccheo v. Toia, 65 App.Div.2d 624 (2d Dept. 1978); Gabel v. Toia, 64 App.Div.2d 267 (4th Dept. 1978); Foran v. Dimitri, 62 App.Div.2d 1124 (3d Dept. 1978), leave to appeal denied, 45 N.Y.2d 706 (1978); Edwards v. Toia,

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* A copy of the decision in Genin v. Toia, is reproduced in Appendix "A" to this Brief.

61 App.Div.2d 1089 (3d Dept. 1978), leave to appeal denied, 44 N.Y.2d 649 (1978); DeRocha v. Berger, 55 App.Div.2d 1042 (4th Dept. 1977); Johnson v. Toia, 55 App.Div.2d 1043 (4th Dept. 1977).

The courts below correctly determined that the contested policy is prohibited by federal law. (Point I, supra). But regardless of the validity of the policy under federal law, petitioners are precluded from applying the policy as a matter of state law. This provides a dispositive reason for denying plenary review.

IV. THE DECISION BELOW ONLY REQUIRES PETITIONERS TO MAKE INDIVIDUAL DETERMINATIONS THAT THE SELF-MAINTAINING INDIVIDUAL'S INCOME WAS APPLIED TO SHARED HOUSEHOLD NEEDS. IT DOES NOT PLACE AN EVIDENTIARY BURDEN ON THE STATE.

Petitioners contend that the decision below places an evidentiary burden on the State to show that the self-maintaining individual's income was applied to shared

household needs, and that this burden should be placed on the recipient. (Petition for Writ of Certiorari, pp. 11-12). This is an erroneous view of the decision of the Court of Appeals.

This action only challenged the validity of petitioners' policy of automatically prorating AFDC grants without making any determination of whether the self-maintaining individual's income was being used for shared household expenses. As the Court of Appeals concluded, "[t]he State did not make an individual determination as to either named plaintiff that her child's income was applied to shared household expenses." (3a).

The decision of the court below simply requires that petitioners make this determination as a prerequisite to proration. Neither the judgment of the district court or any of the opinions of the courts below

place an evidentiary burden on petitioners when they make the necessary determination. That question is simply not in issue in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: August 8, 1979 Respectfully submitted,
New Rochelle, NY

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APPENDIX

Appendix "A"

STATE OF NEW YORK
COURT OF APPEALS

* *

In the Matter of DEBORAH GENIN,

Appellant,

vs.

PHILIP L. TOIA, as Commissioner
of the New York State Department
of Social Services, et al.,

Respondents.

* *

MEMORANDUM:

The order of the Appellate Division should be reversed, with costs, and supplementary grant of public assistance in the category of Aid to Dependent Children to petitioner should be reinstated.

The Commissioner of the State Department of Social Services erred in prorating household expenses between petitioner and her nine-year-old child, a recipient of Social Security survivors' benefits. A child's Social Security benefits may not

be deemed available income for the purpose of determining eligibility for Aid to Dependent Children when such benefits are sufficient to satisfy the needs of the child and the representative payee does not choose to include the child within the AFDC assistance unit. (See Johnson v. Harder, 383 F.Supp. 174, aff'd, 512 F.2d 1188, cert. den., 423 U.S. 876; Howard v. Madigan, 363 F.Supp. 351; Matter of Nelson v. Toia, 92 Misc.2d 575, aff'd, 60 A.D.2d 796, mot. for lv. to app.den., 44 N.Y.2d 646; Matter of Snowberger v. Toia, 60 A.D.2d 783, aff'd, 46 N.Y.2d 803.)

* * * * * * * *

Order reversed, with costs, and supplementary grant of public assistance in the category of Aid to Dependent Children reinstated in a memorandum. Concur: Cooke, Ch. J., Jasen, Gabrielli, Jones, Wachtler, Fuchsberg

Decided July 3, 1979

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL REGULATIONS

OTHER AUTHORITIES

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Intervenor-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

Respondents respectfully submit this supplemental brief in further opposition to the petition for a writ of certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

I. HEW'S INTERPRETATION OF ITS OWN REGULATIONS IS CONTROLLING.

Respondents' primary contention, supported by the decisions of the courts below, is that the contested New York policy is prohibited by the express terms of two HEW regulations, 45 C.F.R. §§ 233.20(a)(2)(viii) and 233.90(a). HEW has taken the unequivocal position that the State policy violates its regulations.

The Solicitor General, expressing the views of the United States, agrees with respondents that the New York policy "conflicted with the regulations established by the Secretary to implement the requirements articulated in the Van Lare decision. See 45 C.F.R. §233.90(a) (Pet. App. 9a-13a)." Brief for the United States as Amicus Curiae, December, 1979, p.7. HEW took the same position in 1978. On February 27, 1978, HEW's Associate Commissioner for Family Assistance found that the

policy violates the applicable federal regulations. He stated that:

> "Under the regulations stated above, [i.e., sections 233.20 and 233.90], a State may not automatically reduce the money amount for any need item on the assumption that a non-needy, non-legally responsible person is contributing to the assistance unit or on the basis that the items of need provided by the State are shared with persons who are not included in the assistance payment." Letter of Barry L. Van Lare, Associate Commissioner for Family Assistance of HEW, February 27, 1978. (annexed hereto as Appendix "A").*

HEW's interpretation of its own regulations is consistent with the express terms of the regulations and the comments thereto, 42 Fed. Reg. 6583 (Feb. 3, 1977).

This Court has always given "HEW the deference due the agency charged with the administration of the Act,...." Lewis v. Martin, 397 U.S. 552,559 (1970). Accord, Miller v. Youakim, 99 S.Ct. 957,

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* Plaintiffs submitted this letter to the district court and it is part of the record.

969 (1979); New York Dept. of Social Services v. Dublino, 413 U.S. 405,421 (1973). In this case, HEW's view as to the meaning of its own regulations is controlling. "In construing administrative regulations, ' the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" United States v. Larinoff, 431 U.S. 864, 97 S.Ct. 2150,2156 (1977), quoting from Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1975).

Since HEW's interpretation is controlling, the petition for a writ of certiorari is without merit.

II. THE CONTESTED POLICY VIOLATES NEW YORK STATE LAW.

In Point III of "Respondents' Brief in Opposition", we argue that certiorari should be denied because irrespective of

the validity of the contested policy as a matter of federal law, petitioners are precluded from enforcing the policy because it has been declared invalid by the New York State courts as a matter of New York State law. See especially, Genin v. Toia, 47 N.Y.2d 959 (1979); Snowberger v. Toia, 46 N.Y.2d 803 (1978); Nelson v. Toia, 92 M.2d 575 (N.Y.Sup.Ct.), aff'd, 60 A.D.2d 796 (4th Dept. 1977), mot. for lv. to app. den., 44 N.Y.2d 646 (1978). In addition to the cited cases, we respectfully refer the Court to the recently reported decision in Matter of McNeil v. Shang, 69 A.D.2d 985 (4th Cir. 1979). In that case, the court made it clear that its holding that the state policy was invalid "was premised upon the interpretation of a State regulation." Id. (emphasis added). Despite this consistent line of final decisions, petitioners continue to maintain the validity

of the contested policy and their right to enforce it.

Moreover, even if petitioners are correct that some of the New York State Court decisions are viewed as resting in whole or in part on an interpretation of federal law, these decisions are final decisions that are binding on petitioners with respect to all similarly situated persons. See Matter of Jones v. Berman, 37 N.Y.2d 42,58 (1975)(class action status denied on the premise that New York Welfare officials will comply with the court's decision with respect to all similarly situated persons). This provides an additional dispositive reason supporting the denial of the petition for a writ of certiorari.

III. THE DISTRICT COURT EXPRESSLY FOUND SUBJECT MATTER JURISDICTION UNDER HAGANS V. LAVINE.

The Solicitor General notes that the courts below did not consider the question

of pendent jurisdiction, Brief for the United States as Amicus Curiae, p.5, n.3. The district court, however, did expressly deal with this question. Swift v. Toia, 450 F.Supp. 983,988 (S.D.N.Y. 1978)(22a). The district court specifically rejected defendant's claim that "jurisdiction should be declined on the basis that plaintiff's claims are insubstantial." (Id.) The court found that "it is obvious that plaintiff's arguments are neither so frivolous nor so insubstantial as to be beyond this court's jurisdiction. Hagans v. Lavine, 415 U.S. 528,539 (1974)." Id. (22a). The district court's reference to the substantiality doctrine, together with its citation to Hagans, make it clear that it found jurisdiction over the statutory claim because it was pendent to constitutional claims that were not insubstantial.

This Court's decision in Chapman v.

Houston Welfare Rights Org. 99 S.Ct. 1905 (1979) did not change the law in the Second Circuit. See especially, Andrews v. Maher, 525 F.2d 113 (2d Cir. 1975).* Indeed, this Court in Chapman cited the Second Circuit decisions dealing with jurisdiction in welfare cases with approval, stating that it "endorse[d] those holdings...." Chapman v. Houston Welfare Rights Org., supra at 1918.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: December 12 1979
New Rochelle, NY

Respectfully submitted,

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Counsel for Respondents

* Andrews is misspelled and miscited in the Chapman opinion. Chapman v. Houston Welfare Rights Org., supra at 1918.

APPENDIX A

APPENDIX "A"

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
WASHINGTON, D.C. 20201

OFFICE OF THE COMMISSIONER

REFER TO: IFA-211

FEB 27

Ms. Elayne Stutzman
Paralegal
Legal Aid Society of Albany Inc.
55 Columbia Street
Albany, New York 12207

Dear Ms. Stutzman:

This is in response to your letter of February 2, 1978 concerning New York State policy which you say violates Federal regulations in 45 CFR 233.20(a)(2)(viii) and 233.90(a).

Federal regulations in 45 CFR 233.20(a)(2)(viii) provides that "the money amount of any need item in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual...." This is also stated in 45 CFR 233.90(a)(1) which precludes States from prorating or otherwise reducing "the money amount for any need item included in the standard on the basis of assumed contributions from non-legally responsible individuals living in the household." These regulations were promulgated in response to a Supreme Court decision in Van Lare v. Hurley.

New York State has a standard for basic needs except shelter which varies by the size of the assistance unit. The State meets shelter as paid to a maximum which also varies according to the size of the assistance unit. You have indicated, however, that New York automatically reduces the amount in the standard when the household includes others who are not AFDC eligible. Under the regulations stated above, a State may not automatically reduce the money amount for any need item on the assumption that a non-needy, non-legally responsible person is contributing to the assistance unit or on the basis that the items of need provided by the State are shared with persons who are not included in the assistance payment.

You also raised question regarding the agency's assumption that the OASDI income of a child is available to others in the assistance unit. Federal policy provides that the

decision of whether to include a child with OASDI income rests with the applicant but if such child is included, his income must be considered available and reduce the payment. In a situation where an OASDI child is the only child, the caretaker relative would be eligible only if the child and his income is included in the payment.

We are sending a copy of this letter to our Regional Office so that they may look into your concerns.

Sincerely yours,

Barry L. Van Lare
Associate Commissioner for
Family Assistance

cc: Office of Regional Commissioner, New York

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-101

BARBARA BLUM, Individually and as Commissioner of the New York State Department of Social Services, and PHILIP L. TOIA,

Petitioners,

against

JOANNE SWIFT, Individually and on behalf of her minor daughter, MICHELLE SWIFT, and on behalf of all other persons similarly situated,

Respondents,

LYLIA ROE, Individually and on behalf of her minor children, CAROL ROE and CHERYL ROE,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Table of Authorities

Cases

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

I

The validity of petitioners' actions in the specific factual situation presented by the named respondents was the only issue decided by the courts below and is the only issue presented for review.

Respondents do not address the issues raised in the Petition for a Writ of Certiorari, which are limited to the

validity of petitioners' actions in regard to self-maintaining children whose mothers receive support payments or other resources on their behalf. The decision of the court below is likewise concerned solely with petitioners' application of these support payments and resources (3a),* as is the factual record.

Respondents argue a broader issue. They contend that because the certified class also includes self-maintaining adults who do not receive support payments, the issue for review is the alleged (albeit undemonstrated) pro-ration of the AFDC grants of the hypothetical recipients with whom these adults allegedly reside. Brief in Opposition, pp. 5-6. Respondents ignore the practical and legal consequences that arise from two different factual situations: 1) the receipt of support income by an AFDC parent on behalf of her non-recipient child; and 2) the receipt of income by a self-maintaining non-recipient adult, who may or may not apply his income to the household's shared costs. Moreover, as respondents only fit within the first situation, they cannot represent the hypothetical recipients who allegedly fall into the second. *Sosna* v. *Iowa,* 419 U.S. 393, 403 (1975); *Hall* v. *Beals,* 396 U.S. 45, 48-49 (1969); *Bailey* v. *Patterson,* 369 U.S. 31, 32-33 (1962).

Respondents do not answer petitioners' argument that *Van Lare* v. *Hurley,* 421 U.S. 338 (1975), does not address the first situation described above. See pp. 7-9 of the Petition. Neither *Van Lare* nor the other federal cases cited on pp. 10-11, 12-15, and 18-19 of the Brief in Opposition discuss the validity, under federal regulations, of prorating AFDC grants when the AFDC parent in *fact receives and has control over support resources* which are sufficient to meet the per capita needs of her non-recipient child.

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* References followed by the letter "a" refer to the Appendix to the Petition for a Writ of Certiorari.

Respondents' single attempt to demonstrate that the pro-ration of their own grants (as opposed to the grants of hypothetical recipients who live with self-maintaining adults) violates *Van Lare* only supports petitioners' argument. See Brief in Opposition, pp. 16-17. As respondents recognize, pro-ration of AFDC grants when a non-recipient's per capita share is not available to the recipients (the *Van Lare* situation) will result in insufficient funds to meet the recipients' per capita needs, and will cause the type of hardships which were factually demonstrated by the recipients in *Van Lare.* However, on the facts, respondents are unable to show that their pro-rated AFDC grants were insufficient to meet their per capita needs. They cannot rely on the speculations of the district court judge regarding future hypothetical harm which could possibly occur on different facts.*

II

The policy held invalid by the courts below is in compliance with State law.

Respondents err in their contention that the State courts have prohibited the application of the economies of scale in the determination of AFDC need when, as here, an amount sufficient to meet the needs of the non-recipient is in fact available. Brief in Opposition pp. 11, 20-22. *Snow-*

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* Not only are those speculations addressed solely to the situation where the support resources are provided in-kind (Roe's situation) and not to the situation where they are provided as money (Swift's situation), they are also ill-founded considering the nature of the support provided for the benefit of Roe's non-recipient child, i.e.: shelter, and anything the child needs, including such shared items as a washing machine and freezer. District Court Opinion, n. 8 (15a). It is no wonder that Roe was unable to demonstrate the hardship which would arise if the per capita needs of herself and her two recipient children were not in fact met by her pro-rated grant.

berger v. *Toia,* 60 A.D. 2d 783, 400 N.Y.S. 2d 648 (4th Dept. 1977), *affd.* 46 N.Y. 2d 803, 386 N.E. 2d 833, 413 N.Y.S. 2d 922 (1978), simply stated that New York Social Services Law § 131-a(3) and 18 N.Y.C.R.R. § 352.30(a) only permit the number of persons applying for or receiving assistance to be counted in determining the statutory size of the public assistance household. *Nelson* v. *Toia,* 92 Misc. 2d 575, 400 N.Y.S. 2d 427 (Sup. Ct. Chautauqua Co.), *affd.* 60 A.D. 2d 796 (4th Dept. 1977), *mot. for lv. to app. den.* 44 N.Y. 2d 646 (1978) held only that 18 N.Y.C.R.R. § 352.2(b) required the exclusion of non-recipients from the determination of the size of a public assistance household.*

The determination of household size is only the first step in determining need. The second step is the deduction of available resources from the State-determined need of a household of the relevant size. New York Social Services Law § 131-a(3). Neither of the cited State decisions prohibit the State from recognizing the savings which accrue from the economies of scale at the second step. In *Padilla* v. *Wyman,* 34 N.Y.2d 36, *app. dism. for failure to state a substantial federal question* 419 U.S. 1084 (1974), the New York Court of Appeals in fact rejected a challenge to the use of the economies of scale, stating that that concept:

> " . . . involves no attribution of the contribution of any one member of the household to the maintenance

* New York Social Services Law § 131-a(3) and 18 N.Y.C.R.R. §§ 352.30(a) and 352.2(b) refer only to the determination of the "basic needs" component of the public assistance grant. They do not affect the computation of the shelter allowance. *Snowberger* also involved a second issue—the application of the amount of the non-recipient mother's Social Security payments which exceeded her needs to reduce the needs of her AFDC child. The Court held that this violated the regulation governing the application of Social Security payments, 20 C.F.R. 404.1603, as that regulation had been interpreted in *Johnson* v. *Harder,* 512 F. 2d 1118 (2d Cir.), *cert. den.* 423 U.S. 876 (1975). This issue is not present in the case at bar.

> of any other member . . . Each contributes his own share to the *reduced pooled costs.*" *Id.,* at 40. (emphasis supplied)

Moreover, this Court recognized, in *Dandridge* v. *Williams,* 397 U.S. 471 (1970), that the purpose of AFDC is to help *families,* and the amount of aid provided must be computed on the basis of the needs of the family unit as a whole. *Id.* at 479.*

Petitioners have changed their administrative procedure of determining need in order to comport with the two-step requirement of § 131-a(3). On March 30, 1979, the New York State Department of Social Services repealed 18 N.Y.C.R.R. §§ 352.30(a) and 352.2, the sections relied on in *Snowberger* v. *Toia, supra,* and *Nelson* v. *Toia, supra,* respectively, and added a new § 352.30(a).** Under this new regulation, household size is determined only by the number of persons applying for or receiving assistance. The savings resulting from the economies of scale when a non-recipient whose income is available to meet his own per capita share of the expenses resides in the dwelling unit is treated as a "resource" to be deducted from the need of the applicants and recipients. When the amount of this "resource" is calculated under the method prescribed by this regulation, the resulting need of respondent Swift is still equal to the need of two-thirds of a house-

* Although the per capita needs of respondents' non-recipient children are met by those children's absent fathers, those children are still "dependent" within the definition thereof in 42 U.S.C. § 606(a).

** A copy of the filing of March 30, 1979, which was made pursuant to New York Administrative Procedure Act § 202(2)(c), is reproduced in Appendix "A" to this brief. The filing also amended 18 N.Y.C.R.R. §§ 352.11, and 352.31.

hold of three, and the need of respondent Roe is still three-fourths of a household of four.*

Genin v. *Toia,* 47 N.Y. 2d 959 (1979), cited on p. 21 of the Brief in Opposition, does not involve an interpretation of State law, as respondents contend. It is solely concerned with the application of a child's Title II Social Security benefits under the federal regulations governing that program, as construed in *Johnson* v. *Harder, supra.* That issue is not present here. Moreover, insofar as *Genin* requires the State to determine the need of a caretaker relative as separate and distinct from that of her dependant child, it conflicts with the "family unit" concept recognized in *Dandridge, supra,* and provides further evidence that this Court's intervention is urgently needed. *See Quern* v. *Mandley,* 436 U.S. 725, 733-734 (1978).

The series of cases cited on pp. 21-22 of the Brief in Opposition are consistent with petitioners' position. In each of the cited cases, the non-recipient (an applicant for or former recipient of public assistance) had no income due to his failure to comply with a requirement of the AFDC or Home Relief program. In contrast, the named respondents receive sufficient income for the explicit purpose of meeting the per capita share of their non-recipient children.

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* I.e.: The basic needs of a household of two (Swift's AFDC household) is $150, and the per capita need of a household of two is thus $75. The basic needs of a household of three (Swift's AFDC household plus her non-recipient child with income available to meet his own per capita needs) is $200, and the per capita need of a household of three is thus $66.66. The "resource" provided by the economies of scale to respondent Swift equals the difference between the per capita needs of a household of two and the per capita needs of a household of three, $75.00—$66.66 = $8.34, multiplied by the number of recipients in Swift's AFDC household (Swift and Michelle), $8.34 x 2 = $16.68. When this resource is subtracted from the basic needs of Swift's AFDC household of two, the resulting amount is equal to two-thirds of the needs of a household of three: $150—$16.68 = $133.32; two-thirds of $200 = $133.32.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
September 21, 1979

Respectfully submitted,

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of Counsel

No. 79-101

In the Supreme Court of the United States

OCTOBER TERM, 1979

BARBARA BLUM, ET AL., PETITIONERS

v.

JOANNE SWIFT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-101

BARBARA BLUM, ET AL., PETITIONERS

v.

JOANNE SWIFT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITES STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of October 1, 1979.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 598 F. 2d 312. The opinions of the district court (Pet. App. 4a-15a, 16a-30a) are reported at 461 F. Supp. 578 and 450 F. Supp. 983.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1979. The petition for a writ of certiorari was filed on July 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a policy of the State of New York which presumes that the needs of an AFDC family are automatically reduced when the family resides with an ineligible related child who is supported by non-welfare sources violates the Social Security Act and regulations promulgated thereunder.

STATEMENT

1. The Aid to Families With Dependent Children (AFDC) program was enacted by Congress in 1935 and is established in Title IV-A of the Social Security Act, 42 U.S.C. 601 *et seq.* The purpose of the AFDC program is to encourage the care of needy dependent children in their own homes or those of relatives in order to help maintain and strengthen family life and to assist the parents or relatives with whom they are living to attain self-sufficiency. 42 U.S.C. 601. Participation in the AFDC program is optional with the states, but states that elect to provide AFDC benefits to their residents receive substantial reimbursement from the federal government on a matching fund basis. 42 U.S.C. 603(a). Before states may participate in the AFDC program, they must submit for the approval of the Secretary of Health, Education, and Welfare a State Plan that meets all the requirements of Title IV-A and its implementing regulations.

The State of New York participates in the AFDC program and has an approved State Plan.[1] Under its AFDC program, New York has established a three-part standard of need on which eligibility for AFDC benefits

[1]The challenged proration policy invalidated by the lower courts in this case was never submitted to or otherwise approved by the Secretary of HEW.

is based. First, there is a statewide standard of regularly recurring monthly needs based on family "household" size. This standard is based on United States Department of Labor (DOL) statistics which demonstrate that per capita living costs vary with changes in household size. These variations are built into the statewide standard. Second, additions are made to the regularly recurring monthly needs of individual applicants for their actual shelter and heating bills, up to a fixed maximum based on "household" size. Finally, the costs of any special need requirements may be added. The resulting total is the applicant's eligibility standard of need. If the applicant family's adjusted income is less than the family's standard of need, then the family is entitled to AFDC payments.

In determining the needs of an AFDC family, the number of individuals included by the State in the AFDC "household" is ordinarily the same as the number designated by the applicant in the AFDC assistance unit. At the time respondents filed this action, however, there were a few situations in which the State would determine that the "household" size was greater than the AFDC assistance unit size. One such situation, which is presented by respondents in this suit, occurred when an AFDC family had residing with it a related child who had sufficient unearned income to make him or her ineligible for AFDC assistance. In this situation New York would increase the "household" size by the number of such non-eligible children residing with the AFDC family (Pet. App. 7a). The result was a larger need standard for the AFDC family than would have been the case had the need standard been based on the AFDC assistance unit size alone.

However, after having determined the increased need standard based on "household" size for an AFDC family that contained a non-eligible child, New York then reduced this need standard by the prorated per capita share of the needs represented by the ineligible child. The State's rationale for prorating was that, since the needs of the non-eligible child were being met from non-welfare sources, the standard of need should be reduced to exclude that child's prorated per capita needs. The resulting reduced need standard was then used as the basis for AFDC assistance to the family (Pet. App. 7a-8a, 11a). As the facts of respondents' cases demonstrate, the prorated need standard for an AFDC family containing an ineligible child can be less than the need standard that would be obtained if the family assistance unit excluded the ineligible child.

2. Respondents are two families of New York AFDC receipients. Between May 1975 and November 1975 respondent Swift received $398 per month in AFDC payments on behalf of herself and her two minor children, Michelle Swift and William Rooney. The monthly AFDC payment for respondent Swift and her family consisted of a $200 basic needs allowance for a three person household plus an actual rent expense of $198. As the result of a judicial support order, respondent Swift thereafter began receiving $150 per month in child support from her son's father. This amount was sufficient to make her son ineligible for public assistance. Respondent reported the receipt of the support money to the New York State Department of Social Services and, after administrative proceedings, her AFDC grant was reduced by one-third or $144.66 per

month.[2] This prorated reduction of one-third reflected the State's presumption that the needs of respondent's son were being met by his father's support payments (Pet. App. 5a).

3. On May 16, 1977, respondent Swift filed this suit in the United States District Court for the Southern District of New York to challenge the reduction in her AFDC payments.[3] She sought declaratory and injunctive relief and money damages.[4] The district court held that the State's prorationing policy was invalid and enjoined its further enforcement (Pet. App. 7a-14a). The court concluded that the policy of prorating the family's AFDC grant due to the presence in the household of a non-eligible child with independent support, without

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[2]Respondent's monthly benefit was computed as $289.34. This figure represented a $234 rent allowance for respondent's then actual rent for a household of three, plus a $200 basic needs allowance for a three person household, less $144.66, which represented the prorated amount of her son's per capita monthly needs (Pet. App. 5a). Respondent contended that her son should not have been included in the household and that her AFDC grant should have been $362, consisting of a $150 basic needs allowance for two people, plus a $212 maximum rent allowance for a two person household (*id.* at 6a).

[3]Respondent raised constitutional as well as statutory objections to the New York procedure. Federal jurisdiction over the constitutional claims was properly based on 28 U.S.C. 1343(3). See *Chapman* v. *Houston Welfare Rights Organization*, No. 77-719 (May 14, 1979), slip op. 1-10. However, the decisions below, which preceded this Court's decision in *Chapman*, did not rule on respondent's constitutional claims and did not consider whether pendent jurisdiction existed over the statutory claims. But see *Holley* v. *Lavine*, 605 F. 2d 638, 646-647 & n.12 (2d Cir. 1979).

[4]Respondent Roe was granted leave to intervene in the action (Pet. App. 28a). The facts of her case followed a pattern essentially identical to that of respondent Swift's claim (Pet. 3-4). The district court also certified the case as a class action (Pet. App. 14a n.1).

eliciting proof that the child's support payments actually contributed to the needs of the household, violated the Social Security Act and implementing federal regulations (*id.* at 7a-13a, citing 45 C.F.R. 233.20(a)(2)(viii), 233.90(a)).

The court of appeals affirmed, noting that the State's policy failed to provide for "an individual determination * * * that [the] child's income was applied to shared household expenses" (Pet. App. 3a) and was therefore invalid under *Van Lare* v. *Hurley*, 421 U.S. 338 (1975), and federal regulations (Pet. App. 3a).

4. On March 30, 1979, New York changed its administrative procedure for determining the needs of an AFDC family and amended various of its public assistance regulations (Pet. Reply Br. App. A).[5] Under the new policy and regulations, New York considers the number of persons contained in the "household" of an AFDC family to be the same as the number contained in the assistance unit designated by the applicant. Each applicant, however, must supply information regarding the income and resources of all persons residing in the dwelling unit and whether such income or resources are being used to meet the common needs (*id.* at 2). In determining the cash assistance to be provided, New York will consider as a "resource" to the AFDC family the lower per capita needs that result from the sharing of expenses with persons living in the dwelling unit who are not eligibile for AFDC assistance (*id.* at 5). The regulations provide a formula for computing the amount of this "resource," which is deducted from the AFDC family's need standard unless the applicant or recipient

[5]These amended regulations have not been approved by the Secretary as of the date of this filing.

can demonstrate that the "resource" is not available to the assistance unit. The new regulations were enacted to supersede the proration policy that is challenged in this action (Pet. Reply Br. 5-6).

DISCUSSION

The challenged New York AFDC policy is no longer in effect. It has been supplanted by a State regulation that apparently requires a more particularized inquiry before assistance payments are reduced due to the presence in the dwelling unit of a non-eligible individual. Although the end result of the computations under the new regulation may approximate that which would have obtained under the State's prior policy (see Pet. Reply Br. 5-6), it cannot be determined at this time precisely how the State will apply its new regulation in concrete factual circumstances. Because the challenged state policy has been replaced by the State of New York, and because it is impossible to adjudicate in this litigation the validity of the State's new regulation, further review of the decision in this case is unwarranted.

Moreover, as respondents point out (Br. in Opp. 9), the decision in this case does not conflict with any decision of this Court or the other courts of appeals. To the contrary, as the courts below concluded (Pet. App. 3a, 7a-13a), the State's now-abandoned policy shared the same vice as the regulations invalidated in *Van Lare* v. *Hurley*, 421 U.S. 338 (1975), in that the State improperly presumed that resources available to a non-eligible household member are also available to eligible members of the AFDC unit. The State's presumption thus conflicted with the regulations established by the Secretary to implement the requirements articulated in the *Van Lare* decision. See 45 C.F.R. 233.90(a) (Pet. App. 9a-13a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1979

IN THE

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OCTOBER TERM, 1979

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Petitioners,

against

JOANNE SWIFT, Individually and on behalf of her minor daughter, MICHELLE SWIFT, and on behalf of all other persons similarly situated,

Respondents,

LYLIA ROE, Individually and on behalf of her minor children, CAROL ROE and CHERYL ROE,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS IN REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-101

BARBARA BLUM, Individually and as Commissioner of the New York State Department of Social Services, and PHILIP L. TOIA,

Petitioners,

against

JOANNE SWIFT, Individually and on behalf of her minor daughter, MICHELLE SWIFT, and on behalf of all other persons similarly situated,

Respondents,

LYLIA ROE, Individually and on behalf of her minor children, CAROL ROE and CHERYL ROE,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS IN REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

POINT I

The issue raised by this case is whether the requirements of *Van Lare* v. *Hurley*, 421 U.S. 338 (1975), concern the application of income which is in fact available; not whether support payments are to be considered available.

The United States' Amicus Brief makes clear that 45 CFR 233.90(a) was established to implement the requirements set forth by this Court in *Van Lare* v. *Hurley*, 421

U.S. 338 (1975), and that petitioners' policy would conflict with 45 CFR 233.90(a) only insofar as it violated those requirements. (Amicus Br. p. 7) The United States asserts that petitioners' policy is invalid under *Van Lare* ". . . in that the State improperly presumed that resources available to a non-eligible household member are also available to eligible members of the AFDC unit". (Amicus Br. p. 7) This is a mischaracterization of the issue involved in this action.

The issue herein is not whether the support income of respondents' non-recipient children was presumed "available" to reduce respondents' per capita needs. Support payments, by their very nature, are in fact available for the specific purpose of providing for the per capita basic needs of their intended beneficiary. As the District Court acknowledged, if respondents apply the support payments to that mandated purpose, their per capita needs are reduced through operation of the economies of scale. (District Court opinion granting respondents' motion for partial summary judgment, Petition, p. 12a)

Thus, the issue herein is whether *Van Lare* requires that petitioners give respondents the option of *not applying* income which is *in fact available* to reduce their per capita needs. The Court below found that *Van Lare* so requires, and instructed petitioners to disregard the availability of the support payments unless that option was not exercised. (Petition, p. 3a) Petitioners contend that *Van Lare* does not give respondents the option of misapplying the support payments (Petition, pp. 7-9); or, if such option does exist, that petitioners must assume that it was not exercised, absent evidence to the contrary. (Petition, pp. 10-14) No such evidence was presented here.

The misunderstanding of the difference between income availability and application of income which is in fact available is rampant. The confusion of the lower courts on this issue is evident from the directly conflicting decisions

of *Padilla* v. *Wyman,* 34 N.Y. 2d 36, 356 N.Y.S. 2d 3, 312 N.E. 2d 149, *app. dism.* 419 U.S. 1084 (1974) and *Gurley* v. *Wohlgemuth,* 421 F. Supp. 1337 (E.D. Pa. 1976). Compare 34 N.Y. 2d at 40 with 421 F. Supp. at 1347. Clarification of the significance of the *Van Lare* decision is urgently needed.

When the opportunity to misinterpret *Van Lare* is not present the confusion regarding "availability" ceases. The Department of Housing and Urban Development's (H.U.D.) recognition that the mere existence of support payments is sufficient to establish "availability" is reflected by H.U.D.'s inclusion of support payments in the definition of "income" for the purpose of computing public housing rent levels. 24 CFR 860.403(o) (ix). A challenge to this policy insofar as it includes a child's Social Security benefits within the definition of "income" was recently rejected in *Garvey* v. *Worcester Housing Authority,* Civil Action No. 77-979-Mc (D. Mass. 1979) (Unreported Opinion of McNaught, D.J., dated June 29, 1979, reproduced in the Appendix of this brief).

Moreover, H.U.D.'s policy has a direct effect on the AFDC program insofar as many AFDC recipients (undoubtedly including plaintiff class members) reside in public housing. Under the lower courts' decision, petitioners must assume that a non-recipient child's support payments, which the housing authority considers to be available income when the rent level is set, are not available to meet the child's share of the rent. Petitioners are therefore required to provide AFDC funds to cover rent costs directly attributable to the support payments received by the non-recipient.*

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* AFDC rent allowances for recipients living in public housing are determined by the number of rooms in the dwelling unit, 18 N.Y.C.R.R. § 352.3(e). Rent allowances for recipients living in private housing are determined by family size, 18 N.Y.C.R.R. § 352.3(a).

POINT II

Petitioners' policy is the same as when this action was commenced.

The United States contends that petitioners' policy is no longer in effect because it has been supplanted by a new regulation which was enacted "to supersede the proration policy that is challenged in this action"; and that this regulation "apparently requires a more particularized inquiry before assistance payments are reduced due to the presence in the dwelling unit of a non-eligible individual". (Amicus Br. pp. 6-7) The United States is mistaken on both counts.

Petitioners' new regulation (Pet. Reply Br. App. A pp. 2-3) was enacted solely to conform with the two-step budgeting methodology required by State law. (Pet. Reply Br. p. 5) The underlying budgetary policy, *i.e.:* proration of AFDC grants when income is available to meet the per capita shared needs of a non-recipient, has not been changed.

The emphasis placed by the United States on the regulation's "more particularized inquiry" is misplaced. The regulation requires:

> "In determining the cash assistance to be provided, the lower per capita needs resulting from the sharing of expenses by all persons in the dwelling unit shall be considered a resource available to reduce the applicant or recipient's need for public assistance *unless the applicant or recipient demonstrates that this resource is not available.*" (emphasis supplied) (Pet. Reply Br. App. A p. 3)

Thus, the necessary inquiry only concerns whether or not the income and resources of the non-recipient are "available" to reduce the recipients' per capita needs. As

discussed in Point I, *ante,* support payments are *always* so "available". Application of this regulation to respondents' situation would therefore result in a grant of exactly the same size as before. (Pet. Reply Br. pp. 5-6)*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
December 20, 1979.

Respectfully submitted,

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* At the present time, the injunction of the lower courts prohibits petitioners from applying the new regulation in this manner.

Appendix A, Opinion.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CIVIL ACTION
No. 77-979-Mc

WALTER GARVEY *et al.*

v.

WORCESTER HOUSING AUTHORITY *et al.*

OPINION

June 29, 1979

McNAUGHT, D.J.

This action came on to be heard on motions for summary judgment filed by all of the parties. Upon consideration of the pleadings and the affidavits filed in support of plaintiffs' motions, interrogatories and answers thereto, and after hearing the parties, the court determines and therefore orders that summary judgment should be entered in favor of Patricia Harris, Secretary of the U.S. Department of Housing and Urban Development, and the Worcester Housing Authority. There is no genuine issue as to any material fact.

The plaintiffs herein challenge the right and practice of the defendants Worcester Housing Authority and the U.S. Department of Housing and Urban Development of including children's Social Security benefits in family income for purposes of computing public housing rent levels. Plaintiffs contend that the practice violates the National Housing Act, 42 U.S.C. §§ 1437a(1) (a).

The plaintiff Walter Garvey brought this class action asserting jurisdiction of this court under Title 28, U.S. Code §§ 1343(3), 1337, 1331, 1361 and Title 5, U.S. Code §§ 701-704. The object of the action is declaratory and injunctive relief pursuant to Title 42, U.S. Code § 1983 and Title 28, U.S. Code §§ 2201 and 2202. The jurisdiction of the court is undoubted.

Mr. Garvey resided with his family at 144 Chino Avenue in Worcester in federally funded public housing owned and operated by the Worcester Housing Authority until February 1, 1977, when he moved from the public housing. His family consisted of himself, his wife, and his wife's three minor children by prior marriages. Plaintiff Louise LaRose, living at 246 Constitution Avenue, Worcester, with her two minor children in a federally funded public housing project owned and operated by the Worcester Housing Authority, became a named plaintiff also. The situation of these two plaintiffs apparently is typical of families in public housing in Massachusetts receiving Socal Security benefits on behalf of members under the age of 18. There is perhaps a maximum of 1,000 such families in Massachusetts [defendant Patricia Harris' answer to plaintiffs' supplemental interrogatories, Answer 1b]. The effect of the practice of the Department of Housing and Urban Development of including Social Security benefits for a child under 18 years of age in the total family income determining the rent of that family in low income public housing projects was felt by the Garvey family in late 1976. The family had been paying rent of $121 for their apartment. The natural father of two of Mr. Garvey's stepchildren passed away, at which time these two children

began receiving Social Security benefits in the amount of $170 per month, each. The Housing Authority included the $340 in the family income for purposes of calculating the rent. Mr. Garvey refused to pay the increase and subsequently the family moved out of public housing.

Louise LaRose lived with her two minor children, and her youngest child, Joseph, received Social Security benefits in the amount of $141.60 after his father became disabled. In June of 1977, in completing the yearly income recertification forms required by the Worcester Housing Authority, the plaintiff Louise LaRose reported the receipt of those benefits. Her adjusted total family income was declared to be increased by the amount of the benefits by the Worcester Housing Authority. Accordingly, on June 17, 1977, the Authority sent her a notice of rent increase, raising her rent from $54 to $75, effective August 1, 1977. There is no question that the reason for the increase in rent was the inclusion of Joseph's Social Security benefits in the adjusted total family income. When Joseph's Social Security benefits were increased, the Authority notified the plaintiff that her rent would be increased to $79 a month on August 1, 1978. An eviction proceeding was begun by the Authority, but in December of 1977 the action was dismissed without prejudice based upon the pendency of this action.

The Statute and the Regulations

The statutory definition of income for the purpose of establishing maximum rentals in public housing projects (set at one-fourth of tenant income) was added to the U.S. Housing Act of 1937 by the Housing and Urban Development Act of 1970. It read, as set forth in 42 U.S.C. § 1402(1), as follows:

> In defining income for purposes of applying the one-fourth of family income limitation set forth above, the Secretary shall consider income from all sources of each member of the family residing in the household who is at least 18 years of age; except that (A) non-recurring income, as determined by the Secretary, and the income of full-time students shall be excluded; (B) an amount equal to the sum of (i) $300 for each dependent, (ii) $300 for each secondary wage earner, (iii) 5 percentum of the family's gross income (10 percentum in the case of elderly families), and (iv) those medical expenses of the family properly considered extraordinary shall be deducted; and (C) the Secretary may allow further deductions in recognition of unusual circumstances.

See Conference Report No. 91-1784, 91st Cong., 2d Sess., reprinted in [1970] U.S. Code, Congressional and Administrative News, 5676-77.

In 1974, the foregoing act was revised by the Housing and Community Development Act. The definition of income was reworded. It added an exclusion for payments by an agency for the care of foster children. The revised language appears in Title 42, U.S. Code § 1437a, as follows:

> . . . In defining the income of any family for the purpose of this Act, the Secretary shall consider income from all sources of each member of the family residing in the household, except that there shall be excluded—
>
> (A) the income of any family member (other than the head of the household or his spouse) who is under eighteen years of age or is a full-time student; . . .

This is the section, the interpretation of which, determines this action.

No discussion of this revision in the legislative history of the Act has been found by the parties. As the defendant Secretary has argued, a comparison of the language of the 1974 statutes reveals that income of family members under the age of 18 was not initially included in the definition, and later it was specifically excluded. In neither instance did the statute define the phrase "income of any family member who is under 18 years of age." At first blush, it would appear that Social Security benefits to a child, whether made in the name of the child or in the name of a guardian, constitute income, and were thus excludable from the total family income basis of public housing rents. The problem, however, is not resolved so simply.

Are Social Security children's benefits income to the child which should be excluded? The Secretary would include the monies issued for the benefit of the child in total family income because the funds are intended for the support of the child. There is no question that (1) Congress could have stated specifically that children's Social Security benefits constituted income, or (2) Congress could have given the Secretary the right to decide in reasonable discretion which type of income would be excluded or included. The Secretary was granted such discretion with regard to non-recurring income. Title 42, U.S. Code § 1437a (1)(B). Plaintiffs contend that, since Congress gave the Secretary discretion concerning non-recurring income, the failure to include a similar requirement with respect to income of children under the age of 18 should not be deemed to have been inadvertent. Plaintiff cites 2 J. Sutherland, Statutory Construction Sec. 4915 (3 Ed. 1943). The Secretary promulgated a regulation to implement the amendment by the Housing and Urban Development Act of 1970. 24 C.F.R. 860.403(o)(ix). A footnote to the definition of total family income, in

circular H.M. 7465.10, issued in March 1971, and re-issued in April of 1972, reads: "Payments to the head of the family for support of a minor are *not* considered to be minor's income and are to be *included* in total family income." [Emphasis in the original.]

On September 26, 1975, the Department of Housing and Urban Development published regulations at 40 F.R. 44323, implementing the addition of a definiiton of income to § 3(1) of the U.S. Housing Act of 1937, as amended by the Housing and Community Development Act of 1974. Part 860, Sub-part D was added to Title 24 C.F.R., defining terms. The regulation as it now reads include in income: "(ix) Payments to the head of the household for support of a minor or payments nominally to a minor for his support, but controlled for his benefit by the head of the household or a resident family member other than the head who is responsible for his support."

The intention of the provision is obvious. One is supposed to include in total family income, payments made for a minor's support subject to the control of an adult family member. This, of course, would include Social Security benefits paid to the children of a deceased insured individual, or to the children of a totally disabled individual.

The parties agreed that it was the established practice of federally subsidized housing authorities and the Department of Housing and Urban Development to include government benefits in total family income for rent determination purposes. It is not disputed that the inclusion of children's Social Security benefits in total family income for rent determination purposes in federally subsidized housing, is consistent with HUD regulations. Plaintiff does contest its alleged consistency with relevant Socal Security regulations (20 C.F.R. § 402, 404.1601-1610).

The defendants draw a policy distinction between income earned by minors and benefits received under the Social Security program. The reason for the distinction, they contend, is social desirability and fundamental fairness. Prior to the receipt of these funds, the minors were maintained by a head of household, and that maintenance included the furnishing of a place to live, as well as other support. They say, therefore, that since shelter is a basic element of maintenance, and since the payments in question are to be applied for the maintenance of a minor, it is equitable that funds intended for maintenance and shelter be factored into the total family income for the purposes of computing rent and public housing. The defendants call the attention of the court to Social Security Administration regulations which define the eligibility of a child for benefits and describe documentation of the eligibility of an adult to whom the payments are made (a representative payee), and urge that these regulations indicate that the benefits are intended primarily for the support of the minor. The defendants point particularly to 20 C.F.R. 404.1604, a Social Security Administration regulation which provides: "Payments certified to a relative or other person on behalf of the beneficiary shall be considered as having been applied for the use and benefit of the beneficiary when they are used for the beneficiary's current maintenance—i.e., to replace current income lost because of the disability, retirement, or death of the insured individual." They advance the argument that, since the "current income" which has been replaced by the benefit would have been includable in calculating family income, the benefit itself should be so includable.

They point also to 24 C.F.R. § 404.1602, which requires that the representative payee be responsible for the care of the beneficiary.

It may be assumed that the children's Social Security benefits are intended primarily for the support of the children themselves. The plaintiffs counter that Social Security benefits are not support payments. They urge the view upon the court that the benefits are not based upon need. They are paid regardless of the financial situation of the child, and where a child's needs are met by other sources, Social Security benefits must be conserved for the future benefits of the child. While there is some merit to this contention, the court accepts the proposition that the benefits are intended primarily for the support and maintenance of the child and can, therefore, be subject to different treatment. Social Security children's benefits are support payments. More troublesome is the apparent inconsistency between the treatment of Social Security benefits paid to full-time students and those paid to minors, since benefits received by full-time students are not includable in total family income. One can, however, rationalize this distinction also, and the outcome of this dispute should not be decided on the basis of that particular plaintiff's argument. I conclude that the HUD regulatory formula is consistent and compatible with the purposes set forth in the Social Security regulations. It is of interest to note, 20 C.F.R. 404.1606, that when a beneficiary of Social Security payments is confined in an institution, the representative payee is required to give priority to expenditure of payments for current maintenance needs, including customary charges made by the institution. Plaintiffs counter with the contention that there are decided cases holding that children's Social Security benefits may not be used to decrease a family's public assistance grants. In these cases, however, including *Howard* v. *Madigan,* 363 F. Supp. 351 (D. S.D. 1973), and *Johnson* v. *Harder,* 383 F. Supp. 174 (D. Conn. 1974), the courts invalidate state regulatory conduct which penalizes families receiving benefits under federal pro-

grams. We are dealing here not with state conduct, nor with any penalty. The regulation in question in this case is not an unreasonable one. It is based on policy grounds which are consistent with the purpose of the Social Security benefit program. This lends presumptive validity to the regulation. We are still left with the question, however, as to whether the apparent clarity of the language of 42 U.S.C. § 1437a(1) (A) allows the seemingly conflicting interpretation of the Department of Housing and Urban Development. The Court does not agree with the plaintiff that the language of the regulation and the language of the statute are absolutely irreconcilable.

One may lean in either direction with respect to the reasonableness of the regulation of the Department of Housing and Urban Development. As recited hereinbefore, it appears to be based upon grounds which are consistent with the purpose and intent of the Social Security benefit program.

There are two other reasons why this court concludes that summary judgment should issue in favor of the defendants in the case. First, federal courts, in construing statutes, attach great significance to an interpretation made by an administrative agency promulgating a regulation under the statute.

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.

Udall v. *Tallman,* 380 U.S. 1, 16 (1975). The interpretation adopted by the Department of Housing and Urban Development was followed in practice since early in 1971. The statute in question was amended (Section 3(1) of the U.S. Housing Act, 42 U.S.C. § 1437(a)) in 1974. The agency interpretation had been embodied through that

period of time in 24 C.F.R. 860.403(o)(ix). Congress did not, in 1974, repudiate the statutory interpretation adopted by HUD. This court, then, must assume Congressional acceptance of the regulation. These two factors, then, the interpretation by the agency or department, and silence on the part of the legislature when amending the statute in question, require that the court assume the propriety of the interpretation given to the statute by the Secretary and enforced by the defendant Worcester Housing Authority.

These considerations outweigh the inclination to assume that when Congress used the word "income", it referred to all monies which might become the property of a child under 18 years of age.

Plaintiffs offer another argument which is worthy of consideration. A provision of the National Housing Act (which is not at issue here) limits rents to 25% of total adjusted family income. Mathematically, it is possible, dependent upon the size of the Social Security benefits received by children in a family, for the percentage of the public housing rent attributable to their receipt of Social Security benefits to exceed what one would normally consider to be their pro rata share of the rent. Plaintiffs contend that, in certain cases therefore, the regulation requires these children to subsidize the rent of other family members and that this result violates the Social Security Act. The defendants respond that it is equitable that funds which are intended for the shelter of a minor be factored into family income for purposes of computing rent. They answer, with common sense, that the regulation does not require the benefits to be used for the support of other family members. They contend further that a minor's right or entitlement to benefits does not exist in the abstract, but relates to the

intended purpose of the benefits and the obligation of a representative payee to use the benefits of a child's maintenance and support. The formula, then, and the court agrees with this conclusion, is consistent and compatible with the purpose of benefits as set forth in the Social Security regulations. For the foregoing reasons, the court concludes that the defendants are entitled to summary judgment.

JOHN J. MCNAUGHT

UNITED STATES DISTRICT JUDGE